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THE EMERGING DUTY TO BARGAIN IN THE PUBLIC SECTOR

Harry T. Edwards*

NEARLY two decades ago, the report of the ABA Committee on Labor Relations of Governmental Employees suggested that

a government which imposes upon private employers certain obligations in dealing with their employees, may not in good faith refuse to deal with its own public servants on a reasonably similar basis modified, of course, to meet the exigencies of public service.¹

A decade later, Professor Russell Smith and Theodore Clark observed that

both the increasing number of state and local employees and the burgeoning unionization of such employees have made it imperative that the states develop some kind of policy in response to the needs and aspirations of public employees which, at the same time, will suitably take account of characteristics peculiar to public employment.²

Both the ABA Report and the Smith and Clark article are significant because they remark about the disparate treatment that has historically been reserved for public sector employees, vis-à-vis their private sector brethren, in the labor relations laws in the United States. The ABA Report, which was written in 1955, proclaimed that public employees should, as a matter of fairness, have bargaining rights comparable to those enjoyed by private employees. The Smith and Clark article, written ten years later, pragmatically suggested that formalized bargaining structures should be created as a matter of expediency to deal with the then obvious surge in the growth of public sector unionism.

Today, the debate over the legitimacy of unionism in the government sector is largely academic. Unionization of government employ-

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1. 1955 PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION, SECTION OF LABOR RELATIONS LAW, REPORT OF COMMITTEE ON LABOR RELATIONS OF GOVERNMENTAL EMPLOYEES 89, 90.

2. Smith & Clark, *Reappraisal of the Role of the States in Shaping Labor Relations Laws*, 1965 WIS. L. REV. 411, 423.

ees and collective bargaining in the public sector are now recognized, albeit not always accepted, facts of life in the United States. On this score, it was recently reported that

[p]ublic employee unions are showing a remarkable rate of growth at a time when labor unions in the private sector are expanding slowly, if at all. Thirty-seven years after Congress passed the Wagner Act to clear the way for mass organizing efforts, about one of every four workers on private payrolls belongs to a union. In the 13 years since Wisconsin approved a pioneering law that encouraged unionization of its state and local government employees, one of every three public workers has enlisted in union ranks. There are now 34 states with laws providing some labor relations framework for dealing with organizations of government employees. The Federal Government now bargains on non-wage issues with unions formed by its employees and Congress has approved collective bargaining for employees of the semi-independent U.S. Postal Service, with arbitration of wage disputes if necessary.

Traditionally docile government workers have shown a new militancy in recent years, often defying state laws to strike for their demands despite hostile public reaction.³

The issue of concern now is not the propriety of unions in the public sector, but rather the viability of legislated structures currently being enacted to formalize collective bargaining for public employees. Since the first such statutes, enacted in the 1950's,⁴ public sector labor relations law has experienced a rapid and accelerating growth. In 1971 alone, nineteen states adopted legislation to change their labor relations procedures.⁵ In 1972, new statutes were enacted in Wisconsin,⁶ Minnesota,⁷ and Alaska.⁸

While this proliferation of new and modified legislation may give some evidence of the increased growth of public sector unionism, unfortunately it also suggests that federal, state, and municipal governments are experiencing certain difficulties in developing viable systems of labor relations. Some of these problems stem from an almost slavish adherence to the notion that the public and private

8. ALAS. STAT. §§ 23.40.070-.260 (1972).
at 1.

4. Act of Aug. 1, 1960, ch. 561, [1960] Mass. Acts & Resolves 488, *as amended*, MASS. ANN. LAWS ch. 149, §§ 178G-N (Supp. 1972); Act of April 27, 1957, ch. 781, § 1, [1957] Minn. Laws 1073, *as amended*, MINN. STAT. ANN. §§ 179.61-.77 (Supp. 1973); Act of July 14, 1955, ch. 255, § 1, [1955] N.H. Laws 386 (codified at N.H. REV. STAT. ANN. § 31:3 (1970)); Act of Sept. 22, 1959, ch. 509, § 1, [1959] Wis. Laws 623, *as amended*, WIS. STAT. ANN. § 111.70 (Supp. 1973).

5. Eaton, *supra* note 3, at 1.

6. WIS. STAT. ANN. §§ 111.80-.97 (Supp. 1973).

7. MINN. STAT. ANN. §§ 179.61-.77 (Supp. 1973).

8. ALAS. STAT. §§ 23.40.070.260 (1972).

sectors cannot be treated alike. Legal scholars and politicians continue to restate the truism that the two sectors are vastly different because of certain legal, economic, and political constraints unique to the public sector.⁹ From this it has been assumed that, for purposes of collective bargaining, private sector legal concepts developed pursuant to the National Labor Relations Act (NLRA)¹⁰ cannot be adopted in the public sector.¹¹ The 1955 ABA Report illustrates this assumption in its suggestion that bargaining be allowed in the public sector, "*modified, of course, to meet the exigencies of public service.*"¹² Similarly, in the Smith and Clark article the authors called for special legislation which "will suitably take account of *characteristics peculiar to public service.*"¹³

Whether the public sector is indeed sufficiently different from the private sector to warrant the assumption that private sector precedents should be avoided, or at least modified, is a question that can and has been argued at length;¹⁴ therefore, it will serve no useful purpose to rehash the issue in this Article. Rather, it is probably sufficient to observe that, for the most part, legislators and judges at the federal, state, and municipal levels have assumed that the two sectors are different; as a consequence, the initial legislative and judicial reactions to public sector unionism have been cautious. Arguments about sovereign authority and the unlawful delegation of legislative authority abound in the early cases;¹⁵ the strike proscription was declared as an inviolable principle;¹⁶ and strict limits were imposed on the process and scope of collective bargaining.¹⁷

9. See generally Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969); Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459 (1971); Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970); Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQUESNE L. REV. 357 (1972); Kheel, *Resolving Deadlocks Without Banning Strikes*, MONTHLY LAB. REV., July 1969, at 62; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

10. 29 U.S.C. §§ 151-68 (1970).

11. See, e.g., H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 146-48 (1971).

12. 1955 PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION, *supra* note 1, at 90 (emphasis added).

13. Smith & Clark, *supra* note 2, at 423 (emphasis added).

14. See articles cited in note 9 *supra*.

15. E.g., *City of Fort Smith v. Council* 38, AFSCME, 245 Ark. 409, 433 S.W.2d 153 (1968); *Mugford v. Mayor & City Council*, 185 Md. 266, 44 A.2d 745 (1946); *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947); *Firefighters Local 293 v. Gardner*, 406 Pa. 395, 178 A.2d 691 (1962).

16. E.g., *Norwalk Teachers' Assn. v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951).

17. E.g., *Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. 1969).

However, as is frequently the case, the passage of time (coupled with the continued growth of public sector unionism) has apparently caused a mellowing of attitudes.

I. THE RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY

It is now generally accepted that public employees have a constitutional right, under the first amendment, to organize and join labor unions.¹⁸ On the theory that this right is essentially meaningless unless the employer is compelled to bargain collectively with his employees, it has even been suggested that public employees may, pursuant to constitutional precept, compel a public employer to engage in collective bargaining. In *Indianapolis Education Association v. Lewallen*,¹⁹ a federal district court found that the unilateral actions of a school board in sending out individual contracts to teachers and adopting a salary benefit schedule in derogation of the exclusive bargaining agent of the teachers constituted unjustifiable interference with the teachers' fundamental right to engage in collective bargaining. However, the Seventh Circuit reversed and held that there is no constitutional right to compel an employer to bargain.²⁰

Despite this reversal, the ember of the concept that a public employer is under a constitutionally mandated duty to have regular dealings with a recognized union continues to glow. Recently, Judge Merhige, sitting in the Eastern District of Virginia, ruled that a public employee union had stated a cause of action by claiming that the employer's refusal to communicate with the union had a "chilling effect" on the employees' first amendment rights.²¹ Only a few months before, a different judge sitting in the same district had held that a public employee union was *not* entitled to an order requiring a municipal employer to bargain.²² Notwithstanding this earlier precedent, Judge Merhige suggested that "the grant of approval to organize and associate without the corresponding grant of recognition may well be an empty and meaningless gesture."²³ Since the case was initially decided on a motion to dismiss, it is not yet clear whether Judge Merhige will seek to remedy the alleged "chilling effect" by compelling the public employer to bargain with the employees' representative.

18. *E.g.*, *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968).

19. 71 L.R.R.M. 2898 (S.D. Ind. 1969).

20. *Indianapolis Educ. Assn. v. Lewallen*, 72 L.R.R.M. 2071, 2072 (1969).

21. *Richmond Educ. Assn. v. Crockford*, 80 L.R.R.M. 3116 (1972).

22. *Fire Fighters Local 794 v. City of Newport News*, 339 F. Supp. 13 (1972).

23. 80 L.R.R.M. at 3117.

The decision by Judge Merhige raises the novel suggestion that, while a public employer may not be bound to "bargain," especially in the absence of legislation which compels collective negotiations, there may nevertheless be some lesser constitutionally mandated duty to communicate and consult with the employees' union. A similar suggestion was made in a different context by a New Jersey state court in *New Jersey Turnpike Authority v. AFSCME*.²⁴ The court rejected the contention that the article in the New Jersey constitution guaranteeing that "persons in public employment shall have the right to organize, present to and make known to the State . . . their grievances and proposals through representatives of their own choosing"²⁵ was designed to guarantee or institute collective bargaining. However, the court did rule that the disputed provision imposed an affirmative obligation on public employers to confer with employee representatives and to "consider in good faith" proposals and grievances.²⁶ Although there have been these indications of a right to consultation, most state courts have held that the state legislature must specifically authorize public sector collective bargaining before they will recognize, or require, full collective bargaining.²⁷

II. THE EMPLOYER'S AUTHORITY TO BARGAIN

Somewhat different from the question of whether a governmental employer may be compelled to bargain is the question of whether it has the authority to bargain in the absence of legislative sanction. The traditional view followed by many courts has been that "a public agency has no legal authority to bargain or contract with a labor union in the absence of express statutory authority."²⁸ How-

24. 83 N.J. Super. 389, 200 A.2d 134 (1964).

25. N.J. CONST. art. I, para. 19.

26. 83 N.J. Super. at 397, 200 A.2d at 139.

27. *E.g.*, *Delaware River & Bay Authority v. International Organization of Masters*, 45 N.J. 138, 211 A.2d 789 (1965); *International Longshoremen's Assn. v. Georgia Ports Authority*, 217 Ga. 712, 124 S.E.2d 733 (1962).

28. *Operating Engrs. Local 321 v. Water Works Bd.*, 276 Ala. 462, 463, 163 S.2d 619, 620 (1964). The extent of the common-law restriction on bargaining was recently exemplified by the decision of the Arizona court of appeals in *Board of Educ. v. Scottsdale Educ. Assn.*, — Ariz. App. —, 498 P.2d 578 (1972), in which the court voided an existing contract between the board of education and the teachers association and held that the board had the authority to "negotiate" with the teachers only insofar as "negotiation" meant "meeting and consulting." — Ariz. App. at —, 498 P.2d at 583. The court also ruled that the board was not free to delegate its authority to manage and control the school district without specific legislative authorization. *See also International Longshoremen's Assn. v. Georgia Ports Authority*, 217 Ga. 712, 124 S.E.2d 733 (1962); *Weakly County Mun. Elec. Sys. v. Vick*, 43 Tenn. App. 524, 309 S.W.2d 792 (1957).

ever, exceptions to this rule have occasionally been made where a governmental agency is functioning in a proprietary manner, as in the operation of a port authority or municipal electric system.²⁹ The public employer's authority to bargain collectively is implied from the agency's broad powers to make contracts for workers and to manage the enterprise. The courts in these cases have accepted the theoretical notion that where a governmental entity performs a proprietary function it must be allowed to operate as efficiently as a private business;³⁰ this includes the freedom to devise means of effectively competing in the labor market.³¹

Today, the importance of these occasional judicial attempts to distinguish between "proprietary" and "uniquely governmental" functions has lessened.³² For one thing, the increasing size and complexity of government makes it nearly impossible to draw any meaningful line between proprietary and governmental functions. For another, more than a majority of the states and the federal government have statutes, ordinances, or executive orders regulating labor relations in the public sector. Thus, in at least some jurisdictions, the need for judicial creativity to encourage or sanction collective bargaining is less compelling now than in years past.

Only one significant decision, rendered by an Illinois court of appeals, has held that a public employer has the authority, in a non-proprietary area and absent a statute, to engage in private-sector-type collective bargaining with an exclusive representative of the employees in an appropriate unit.³³ As previously noted, other state courts have held that a public employer may engage in some lesser degree of bargaining, such as formal or informal communication or

29. *E.g.*, *Local 266, IBEW v. Salt River Project Agric. Improvement & Power Dist.*, 78 Ariz. 30, 275 P.2d 393 (1954); *Christie v. Port of Olympia*, 27 Wash. 2d 534, 179 P.2d 294 (1947).

30. *Local 266, IBEW v. Salt River Project Agric. Improvement & Power Dist.*, 78 Ariz. 30, 275 P.2d 393 (1954).

31. *Christie v. Port of Olympia*, 27 Wash. 2d 534, 179 P.2d 294 (1947).

32. *See, e.g.*, *Indiana Towing Co. v. United States*, 350 U.S. 61 (1955), in which the Supreme Court rejected the proprietary-governmental distinction as inherently unsound in applying the Federal Tort Claims Act, ch. 735, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.). The distinction may yet have some life in states, such as Arizona, which have not yet adopted public sector bargaining statutes. *E.g.*, *Local 266, IBEW v. Salt River Project Agric. Improvement & Power Dist.*, 78 Ariz. 30, 275 P.2d 393 (1954).

33. *Chicago Div. of Ill. Educ. Assn. v. Board of Educ.*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966). However, while a public employer may be *authorized* to recognize and bargain collectively with a union, he is not *required* to do so in Illinois. *Cook County Police Assn. v. City of Harvey*, — Ill. App. 2d —, 289 N.E.2d 226 (1972). The Illinois precedent established in *Chicago Division* has recently been followed in Indiana. *Local 511, Teachers v. Board of Trustees*, — Ind. App. —, 287 N.E.2d 891 (1972); *Local 4, Teachers v. School City of Gary*, — Ind. App. —, 284 N.E.2d 108 (1972).

consultation with employee groups,³⁴ but these courts have not imposed any affirmative obligation on the employer to engage in such consultations.

In the cases that hold that a public employer has no inherent authority to bargain collectively, the courts usually justify their decisions on the grounds that collective bargaining detracts from the sovereign authority of the state³⁵ or that it results in an illegal delegation of power.³⁶ However, the knowledge, derived from actual experience, that public sector collective bargaining does not automatically endanger the community has tended to dispel the long-held belief that "[t]o tolerate or recognize any combination of civil service employees . . . is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our government is founded."³⁷ On the other hand, although the sovereignty and delegation concepts are relied on less frequently today to void contracts freely entered into between public employers and employees, the continuing impact of these theories cannot be discounted or ignored. The best evidence of the present vitality of these doctrines may be seen in the federal sector, where the courts have consistently refused to interfere with labor relations problems in the federal civil service arising under Executive Order No. 11,491.³⁸

III. THE IMPACT OF THE STRIKE PROSCRIPTION ON THE DUTY TO BARGAIN

Before launching into an examination of the nature of the duty to bargain in the public sector, one final passing comment is warranted. Probably the most significant distinction between the public and private sectors is the long-standing and universally followed prohibition against public employee strikes. In most states and in the federal service, there is a common-law or legislated proscription

34. *E.g.*, Board of Educ. v. Scottsdale Educ. Assn., — Ariz. App. —, 498 P.2d 578 (1972); Norwalk Teachers' Assn. v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); State Bd. of Regents v. Packing House Workers Local 1258, 175 N.W.2d 110 (Iowa 1970).

35. *E.g.*, Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 168 P.2d 741 (1946); Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 S.2d 194 (1946); City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947).

36. *E.g.*, City of Fort Smith v. Council 38, AFSCME, 245 Ark. 409, 433 S.W.2d 153 (1968); Mugford v. Mayor & City Council, 185 Md. 266, 44 A.2d 745 (1946). *Cf.* State *ex rel.* Local 350, Fire Fighters v. Johnson, 46 Wash. 2d 114, 278 P.2d 662 (1955).

37. Railway Mail Assn. v. Murphy, 180 Misc. 868, 875, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943), *revd. on other grounds sub nom.* Railway Mail Assn. v. Corsi, 267 App. Div. 470, 47 N.Y.S.2d 404, *affd.*, 293 N.Y. 315, 56 N.E.2d 721 (1944), *affd.*, 326 U.S. 88 (1945).

38. 3 C.F.R. 262 (1973). *See, e.g.*, Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); Lodge 1647, AFGE v. McNamara, 291 F. Supp. 286 (M.D. Pa. 1968).

of the right to strike in the public sector.³⁹ Only Alaska, Hawaii, Montana, Pennsylvania, and Vermont have enacted legislation giving public employees a limited right to strike.⁴⁰

Labor leaders, of course, have argued that the absence of the strike weapon in the public sector reduces collective bargaining to collective begging.⁴¹ Yet, the validity of such a conclusion is at best speculative. There is enough data to suggest that, in the public sector, there may be a *de facto* right to strike, despite the legal strike bans in force.⁴² The threat or exercise of this *de facto* right to strike appears to be no less effective than the legalized right enjoyed by employees in the private sector. Moreover, it is possible that statutory impasse procedures, such as arbitration, fact-finding, and legislative hearings, may be a source of great bargaining leverage for public unions. For example, many municipal employers in Michigan have claimed that the state's compulsory arbitration act for policemen and firemen⁴³ has produced arbitrated settlements far in excess of what might have been produced by traditional collective bargaining.⁴⁴ There obviously is no sure way to test this hypothesis, but the claim at least raises the question of how much, if any, bargaining power unions actually lose by virtue of the strike ban in the public sector.

The strike proscription probably does change the bargaining process in the public sector, primarily because of the introduction

39. See, e.g., *United Fedn. of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd.*, 404 U.S. 802 (1971); *Anderson Fedn. of Teachers v. School City of Anderson*, 252 Ind. 558, 251 N.E.2d 15 (1969), *cert. denied*, 399 U.S. 928 (1970).

40. ALAS. STAT. § 23.40.200(d) (1972); HAWAII REV. STAT. § 89-12 (Supp. 1971); MONT. REV. CODES ANN. § 41-2209 (Supp. 1971); PA. STAT. ANN. tit. 43, § 1101.1003 (Supp. 1972); VT. STAT. ANN. tit. 21, § 1704 (Supp. 1972). See generally Edwards, *supra* note 9, at 376-78.

41. See, e.g., Wolk, *Public Employee Strikes—A Survey of the Condon-Wadlin Acts*, 13 N.Y. L.F. 69, 77 (1967); BUS. WEEK, Dec. 3, 1966, at 94.

42. See U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, WORK STOPPAGES IN 1971 (SELECTED FINAL TABULATIONS) 2, 6 (June 1972). There were at least 70 teacher strikes in the fall of 1972. BNA GOVERNMENT EMPLOYEE RELATIONS REPORT [hereinafter GERR] No. 471, at B-10 to -14 (Sept. 25, 1972).

43. MICH. COMP. LAWS ANN. §§ 423.231-247 (1967), *as amended*, (Supp. 1972).

44. In its September 1972 convention the Michigan Municipal League adopted the following resolution:

NOW THEREFORE BE IT RESOLVED, That the Michigan Municipal League in convention assembled this 28th day of September, 1972, records its continued opposition to the compulsory arbitration of public employee labor disputes in principle because it is destructive of free collective bargaining throughout the public sector and is an improper intrusion on the legislative authority of local governing bodies, impairing their ability to carry out their sworn duties to their electors

LMRS NEWSLETTER, Nov. 1972, at 1.

The Michigan Municipal League has been joined in its opposition to compulsory police and fire arbitration provisions by similar groups in Pennsylvania, Wisconsin, and Wyoming. *Id.* at 1-2. The extent of this opposition is significant since compulsory police and fire arbitration legislation is now in effect in only six states and New York City. *Id.* at 1.

of and heavy reliance on statutory impasse procedures, which are not common in the private sector. However, it is not at all clear that the strike ban in the public sector produces any measurable change in the "power politics" seen at the bargaining tables.

IV. THE NATURE OF THE OBLIGATION TO BARGAIN COLLECTIVELY

As noted earlier, the bargaining obligation, if it exists, is usually imposed by statute. At last count, at least thirty-four states had statutes imposing some kind of bargaining obligation in the public sector.⁴⁵ The significance of a statute in establishing the parameters of collective bargaining cannot be overemphasized. As Reynolds Seitz has noted:

[A] statute can spell out election procedures to be used in the determination of a majority representative in an appropriate unit. It can make clear that bargaining is to be on an exclusive basis with the organization that represents the majority representative in an appropriate unit. It can express other intents. If there is no statute, whatever attempts are made at bargaining may break down in arguments over procedure and over such questions as exclusive representation.⁴⁶

The courts share the view that public sector collective bargaining statutes are important. In fact, at least one court has taken the initiative in prodding the legislature to enact such a statute. In *Dade County Classroom Teachers Association v. Legislature of the State of Florida*,⁴⁷ the Florida supreme court held that a public sector bargaining statute or a judicial equivalent thereof was not only necessary but required by that state's constitution.⁴⁸ The court apparently concluded that the absence of statutory guidelines constituted a denial or abridgment of the constitutional right of public employees to bargain collectively, and therefore warned the legislature that failure to pass such guidelines would force the court to accomplish the same result by judicial fiat. However, the association's request for mandamus to force the legislature to enact a statute was

45. For an exhaustive list of these statutes, see Blair, *State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 1, 3-4 n.18 (1973).

46. Seitz, *Legal Aspects of Public School Teacher Negotiating and Participating in Concerted Activities*, 49 MARQ. L. REV. 487, 498-99 (1966).

47. 269 S.2d 684 (Fla. 1972).

48. FLA. CONST. art. I, § 6 provides:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

denied because the court felt that the judiciary should not compel the legislature to exercise a purely legislative prerogative. Nevertheless, the court pointed to court-ordered reapportionment plans as authority for the proposition that the court could act in the face of legislative inaction to facilitate the exercise of constitutional rights.⁴⁹ But the court refused to grant such relief, for

[t]he Legislature, having thus entered the field, we have confidence that within a reasonable time it will extend its time and study into this field, and, therefore, judicial implementation of the rights in question would be premature at this time.⁵⁰

V. THE BARGAINING PROCESS IN THE PUBLIC SECTOR

A. *The Legacy from the Private Sector*

In private sector labor relations, the duty to bargain is defined by section 8(d) of the NLRA⁵¹ as

the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession

The obligation to negotiate in good faith has been interpreted by the courts as requiring a duty to participate actively in deliberations with a sincere desire and intention to reach an agreement.⁵² Normally, this would encompass give and take on both sides until some agreement is reached, but there is no legal duty to agree. Furthermore, the NLRA does not preclude an employer from bargaining in good faith for unilateral control over a matter covered by the duty to bargain.⁵³ Similarly, the failure to make a counter-proposal is not a per se violation of the NLRA;⁵⁴ however, such a failure, in the context of the totality of a party's conduct at the bargaining table, may lead to the inference of bad faith bargaining.⁵⁵ In essence, the requirement of good faith bargaining in the private sector is simply that both parties manifest a type of attitude and conduct which will be conducive to the reaching of an agreement.

49. 269 S.2d at 687.

50. 269 S.2d at 688.

51. 29 U.S.C. § 158(d) (1970).

52. *E.g.*, *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943).

53. *NLRB v. American Natl. Ins. Co.*, 343 U.S. 395 (1952).

54. *NLRB v. Arkansas Rice Growers' Cooperative Assn.*, 400 F.2d 565, 571 (8th Cir. 1968).

55. *NLRB v. General Elec. Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

B. *The Muddle of Bargaining Models in the Public Sector:
"Meet and Confer" or "Collective Negotiations"*

Statutes concerned with public sector bargaining may be divided into two categories: those providing for "collective negotiations" and the so-called "meet and confer" statutes. In states, such as Michigan, which have adopted the collective-negotiations approach, the statutory definition of the duty to bargain is often identical or very similar to that found in the NLRA.⁵⁶ It is probably safe to assume that these statutes were intentionally designed to incorporate by reference private sector precedents. On this score, it is interesting to note that the Michigan Employment Relations Commission (MERC) frequently cites NLRB precedents in deciding cases under that state's Public Employment Relations Act.⁵⁷

Before attempting an appraisal of legislation based on the meet-and-confer model, it may be helpful to contrast it with the collective-negotiations approach presently recognized in the private sector. "Meet-and-confer negotiations" can be defined as the

process of negotiating terms and conditions of employment intended to emphasize the differences between public and private employment conditions. Negotiations under "meet and confer" laws usually imply discussions leading to unilateral adoption of policy by legislative body rather than written contract, and take place with multiple employee representatives rather than an exclusive bargaining agent.⁵⁸

This definition fairly describes what was originally intended by the meet-and-confer standard of bargaining. Implicit in the *pure* meet-and-confer approach is the assumption that the private sector bargaining model would be overly permissive if applied without qualification to the public sector. In other words, it is argued that public employers should retain broad managerial discretion in the operation of a governmental agency, subject only to the recall of the electorate. Thus, under the pure meet-and-confer bargaining model, the outcome of any public employer-employee discussions will depend more on management's determinations than on bilateral decisions by "equals" at the bargaining table. In contrast, the parties in the private sector meet as equals and are free to negotiate to a point of impasse all "mandatory" subjects of bargaining—matters concerning wages, hours, and conditions of employment.⁵⁹

56. See, e.g., MICH. COMP. LAWS ANN. § 423.215 (1967); PA. STAT. ANN. tit. 43, § 1101.701 (Supp. 1972).

57. See, e.g., Westwood Community Schools, 7 Michigan Employment Relations Commission Labor Opinions [hereinafter MERC Lab. Op.] 913 (1972).

58. GERR REFERENCE FILE 91:02-03 (1970).

59. The parties, however, may not insist that "permissible" subjects be bargained upon. See text accompanying notes 108-09 *infra*.

It is generally assumed that most states which have passed statutes dealing with public sector labor relations have opted for the collective-negotiations model over the meet-and-confer approach. Close study of the legislation, however, reveals that this conclusion appears to be somewhat overdrawn and, at best, misleading. Actually, most states have rejected the pure meet-and-confer bargaining model, but, by the same token, most have also rejected the collective-negotiations approach. In practice, most states have adopted either a *modified* meet-and-confer statute, which gives unions more bargaining power than the pure model, or a *modified* collective-negotiations statute, which is more restrictive from the union's viewpoint than its private sector counterpart. For this reason alone, it is often difficult to distinguish between meet-and-confer and collective-negotiations as viable working concepts in the public sector.

Most critics of meet-and-confer have argued that any bargaining structure which relegates the employees' representative to the status of a "conferee" or "discussant," rather than a negotiator, is patently deficient. But this criticism rests on the assumption that the bargaining process is in fact different under a meet-and-confer, as opposed to a collective-negotiations, model. However, the recent history of collective bargaining in the public sector suggests that there is relatively little difference in bargaining tactics or techniques under these two models. Unions in the public sector have pressed for the same type of demands and with the same vigor under both models. Moreover, many of the states which have passed meet-and-confer statutes have so distorted the pure meet-and-confer bargaining model that it is no longer accurate to say that the parties governed by these statutes do not meet as "equals."

At last count, seven states—Alabama, California, Idaho, Kansas, Missouri, Montana, and Oregon—had some form of meet-and-confer legislation covering various groups of government employees.⁶⁰ Of these, only Missouri, Alabama, and California have statutes that embody the *pure* meet-and-confer approach. For example, as the Supreme Court of Missouri ruled in *Missey v. City of Cabool*,⁶¹ the Missouri statute does

not purport to give to public employees the right of collective bar-

60. ALA. CODE tit. 37, § 450(3) (Supp. 1969); CAL. EDUC. CODE §§ 13080-90 (West 1969), *as amended*, (West Supp. 1972) (Winton Act—teachers); CAL. GOVT. CODE §§ 3525-36 (West Supp. 1972) (state employees); CAL. GOVT. CODE §§ 3500-11 (West 1966), *as amended*, (West Supp. 1972) (Meyers-Milias-Brown Act—other public employees); IDAHO CODE §§ 44-1801 to -1811 (Supp. 1971); KAN. STAT. ANN. §§ 75-4321 to -4335 (Supp. 1972); MO. STAT. ANN. §§ 105.500-.530 (Supp. 1973); MONT. REV. CODES ANN. §§ 75-6115 to -6128 (1971); ORE. REV. STAT. §§ 342.440-.480, 342.710-.780 (1971).

61. 441 S.W.2d 35 (Mo. 1969).

gaining guaranteed . . . to employees in private industry The act does not constitute a delegation . . . to the union of the legislative power of the public body, and therefore . . . the prior discretion in the legislative body to adopt, modify or reject outright the results of the discussions is untouched. . . . The act provides only a procedure for communication between the organization selected by public employees and their employer without requiring adoption of any agreement reached.⁶²

The recently enacted statute covering state employees in California seems to follow the principles espoused in *Missey*, for it simply requires the state representatives to "meet and confer" with employee representatives upon request, and to "consider," as fully as is deemed reasonable by the government representative, presentations made by the employee representative. The statute clearly indicates that after the state has reasonably "considered" union proposals, it may then act unilaterally with respect to wages, hours, and conditions of employment.⁶³

While it is plain that in some states, the parties do not meet as equals at the bargaining table, there are other meet-and-confer jurisdictions in which the matter has not been so neatly resolved. In Kansas, for example, the duty to meet and confer encompasses more than a mere exhortation to the public employer to "consider" employees' proposals; it is a mutual obligation to "meet and confer in order . . . to endeavor to reach agreement on conditions of employment."⁶⁴ Other meet-and-confer statutes state even more explicitly that the employer's duty goes beyond listening to its employees' suggestions. For example, the Montana statute makes it an unfair labor practice for a government employer to refuse to "meet, confer, or negotiate *in good faith*."⁶⁵

The concept of meeting and conferring *in good faith* has been supported by the Advisory Commission on Intergovernmental Rela-

62. 441 S.W.2d at 41.

63. CAL. GOVT. CODE §§ 3525-36 (West Supp. 1972). The act governing teacher negotiations expressly provides that the final decision is to be made by the public school employer. CAL. EDUC. CODE § 13088 (West Supp. 1972). Cf. *Torrance Educ. Assn. v. Board of Educ.*, 21 Cal. App. 2d 589, 98 Cal. Rptr. 639 (1971).

64. KAN. STAT. ANN. § 75-4322(1) (Supp. 1972) (emphasis added). In contrast to the situation in pure meet-and-confer states, the Kansas public employer cannot implement proposals unilaterally upon reaching impasse. At impasse the Kansas statute calls for mediation, fact-finding with recommendations, and voluntary arbitration. KAN. STAT. ANN. § 75-4332 (Supp. 1972). Thus, whatever differences may exist between the duty to meet and confer as it exists in Kansas and the duty to bargain collectively *prior* to impasse, the Kansas procedure *on reaching* impasse is virtually identical to procedures established in some collective-negotiations states. *E.g.*, HAWAII REV. STAT. § 89-11 (Supp. 1971); MINN. STAT. ANN. §§ 179.69(1), 179.72(9)-(11) (Supp. 1973); N.Y. CIV. SERV. LAW § 209 (McKinney 1973).

65. MONT. REV. CODES ANN. § 75-6120 (1971) (emphasis added).

tions (ACIR). In a lengthy report, the Commission opted for a modified meet-and-confer approach, which it explained as follows:

"In good faith" has a number of important connotations as it applies to the meet and confer process. It obligates the governmental employer and a recognized employee organization to approach the discussion table with an open mind. It underscores the fact that such meetings should be held at mutually agreeable and convenient times. It recognizes that a sincere effort should be made by both parties to reach agreement on all matters falling properly within the discussions' purview. It signifies that both sides will be represented by duly authorized spokesmen prepared to confer on all such matters. . . . It calls for a free exchange to the other party, on request, of non-confidential data pertinent to any issues under discussion. It implies a joint effort in drafting a non-binding memorandum of understanding setting forth all agreed upon recommendations for submission to the jurisdiction's appropriate governing officials. It charges the governmental agent to strive to achieve acceptance and implementation of these recommendations by such officials. It affirms that failure to reach agreement or to make concessions does not constitute bad faith when real differences of opinion exist. It requires both parties to be receptive to mediation if *bona fide* differences of opinion produce an impasse. Finally, it means that the State public labor-management relations law should list as an unfair practice failure to meet and confer in good faith, thereby providing a basis for legal recourse.⁶⁶

It is noteworthy that the ACIR recommendations, which have been followed by some states, include the suggestion that the parties may be required to bargain in "good faith" to a point of impasse. Surely, if this is a part of the definition of meet and confer, then the *bargaining process* is not much different from the collective-negotiations approach.

The apparent distinction between the ACIR modified meet-and-confer approach and the traditional collective-negotiations approach is the ACIR suggestion that the result of bargaining should be "a non-binding memorandum of understanding setting forth all agreed upon recommendations for submission to the jurisdiction's appropriate governing officials." But the requirement of a *conditional agreement* does not really distinguish the modified meet-and-confer states from some states which have followed the collective-negotiations model. Under the New York Taylor Act,⁶⁷ it is provided that any labor agreement between a public employer and a union must

66. ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE & LOCAL GOVERNMENTS 102 (1969).

67. N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973).

include, "in type not smaller than the largest type used elsewhere in the agreement," the following clause:

It is agreed . . . that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefor, shall not become effective until the appropriate legislative body has given approval.⁶⁸

Thus, even in New York, which has one of the most comprehensive collective-negotiations statutes, the end product of bargaining may be nothing more than a *conditional* agreement.⁶⁹

The curious mixture of statutory schemes used to define the duty to bargain in the public sector probably just reflects the initial reluctance of state legislatures to adopt the private sector bargaining model in toto. However, some of this legislative reticence is beginning to mellow. Minnesota and Alaska recently shunned meet-and-confer language in newly adopted statutes,⁷⁰ and the word "negotiate" was recently substituted for the word "confer" in the South Dakota statute.⁷¹

C. *The Varying Bargaining Rights for Different Classes of Public Employees*

In the preceding discussion of how the bargaining process varies from state to state, it has been assumed that each state has adopted the same bargaining procedures for all public employees. Actually, some state legislatures have grouped public employees into several classes for the purposes of defining bargaining rights, and each class tends to be burdened with its own restrictions. For example, the scope of state employee bargaining is often restricted in deference to pre-existing civil service laws.⁷² In the case of municipal employees, a concern for home rule has produced some statutes that cover municipal employees only at local option.⁷³ In addition to state and municipal employees, other groups, such as policemen and firemen, teachers, and miscellaneous employees (nurses, noncertificated

68. N.Y. CIV. SERV. LAW § 204-a(1) (McKinney 1973).

69. See also text accompanying notes 99-101 *infra*.

70. ALAS. STAT. §§ 23.40.070-.260 (1972); MINN. STAT. ANN. §§ 179.61-.77 (Supp. 1973).

71. S.D. COMP. LAWS ANN. § 3-18-2 (Supp. 1972).

72. CAL. GOVT. CODE §§ 3500 (West 1966), 3525 (West Supp. 1972); KAN. STAT. ANN. § 75-4330 (Supp. 1972); ME. REV. STAT. ANN. tit. 26, § 969 (Supp. 1972); MASS. ANN. LAWS ch. 149, § 178I (Supp. 1972); PA. STAT. ANN. tit. 43, § 1101.703 (Supp. 1972); VT. STAT. ANN. tit. 3, § 905 (1972); WASH. REV. CODE § 41.56.100 (1969); WIS. STAT. ANN. § 111.91(2)(b) (Supp. 1973).

73. E.g., CAL. GOVT. CODE §§ 3500-11 (West 1966), as amended, (West Supp. 1972); KAN. STAT. ANN. §§ 75-4321 to -4335 (Supp. 1972); ORE. REV. STAT. §§ 243.711-.795 (1971).

employees of school districts, etc.) are frequently singled out for special treatment.

The class of public employees most often differentiated from the others is teachers. As noted hereafter, some state statutes reflect the view that certain professional employees—administrators, technicians, and scientists, but primarily teachers—are valuable resource personnel and that they should therefore be available for consultation on policy matters, in a nonadversary situation, lest their expertise be lost to the public employer. As a consequence, some statutes not only seek to protect the right of these employees to *bargain* with respect to what are traditionally viewed as mandatory subjects of bargaining, but also preserve for these employees the right to *discuss* other matters which, absent statutory provisions, would be either wholly within the discretion of the public employer or not a mandatory subject of bargaining. Under the new Minnesota public employee relations statute,⁷⁴ for example, all public employees have the right to “meet and negotiate” with respect to terms and conditions of employment,⁷⁵ while “professional employees” have the additional right to “meet and confer” . . . over items not defined as “terms and conditions of employment.”⁷⁶ Minnesota is unique in its bifurcation of the duty to bargain in a single statute. Several other states have separate statutes designed to *narrow* the scope of bargaining for professionals so as to avoid adversary confrontations on policy issues.⁷⁷

The type of bargaining authorized for teachers is often given the name “professional negotiations.” However, the use of this term may be meaningless as a practical matter. For example, in the Kansas statute applying to teachers,⁷⁸ “professional negotiations” has virtually the same meaning as does the modified meet-and-confer obligation, discussed above,⁷⁹ which covers other public employees. Similarly, in Vermont, “professional negotiations” is defined to mean “meeting, conferring, consulting, discussing *and negotiating*.”⁸⁰ Thus the term may merely reflect the attempts by some state legislatures to avoid traditional collective bargaining in situations involving professional employees.

74. MINN. STAT. ANN. §§ 179.61-.77 (Supp. 1973).

75. MINN. STAT. ANN. § 179.65(4) (Supp. 1973).

76. MINN. STAT. ANN. §§ 179.65(3), 179.73 (Supp. 1973).

77. *E.g.*, NEB. REV. STAT. §§ 79-1278 to -1295 (Supp. 1969); ORE. REV. STAT. §§ 342.440-.480 (1971).

78. KAN. STAT. ANN. §§ 72-5413 to -5425 (Supp. 1972).

79. *See* note 64 *supra* and accompanying text.

80. VT. STAT. ANN. tit. 16, § 1981(2) (Supp. 1972) (emphasis added).

The trend in state legislation away from the initial flirtation with meet-and-confer is not yet complete. Even as they amend legislation to conform more generally to the dominant collective-negotiations model, some state legislatures continue to cling to the notion that there ought to be *some* differences between the public and private sectors with respect to the nature of the duty to bargain. It is not clear, however, that legislative attempts to preserve the remnants of a limited bargaining model in the context of over-all liberalization will have any practical effect on the behavior of the parties at the bargaining table.

D. *Exclusive Representation*

As part of the liberalizing trend with respect to the bargaining process, most states now accept the principle of exclusive representation. However, one state supreme court has held that exclusive representation violates the employee's right to refrain from joining a union.⁸¹ The only other major exception to the exclusive representation principle is the California Winton Act⁸² (covering public school teachers), which provides for proportional representation of employee groups through "negotiating councils." The California court of appeals has held in two cases that employee groups may not be recognized or negotiate except through these councils.⁸³ But even in California there is movement away from proportional representation; the exclusive representation principle has been incorporated in recent amendments to the Meyers-Millias-Brown Act,⁸⁴ which applies to local employees.

E. *The Impact of the "Sunshine Laws"*

An interesting problem with respect to the process of bargaining results from the conflict of the government's duty to conduct business openly with the practical requirement that collective bargaining discussions be conducted with some privacy. In Florida, for example, the so-called "Sunshine Law"⁸⁵ requires that all meetings of state agencies be open to the public. Thus, in *Bassett v. Braddock*,⁸⁶ the Florida supreme court was faced with the question of whether a

81. *Dade County Classroom Teachers' Assn. v. Ryan*, 225 S.2d 903 (Fla. 1969).

82. CAL. EDUC. CODE §§ 13080-88 (West 1969), *as amended*, (West Supp. 1972).

83. *West Valley Fedn. of Teachers v. Campbell Union High School Dist.*, 24 Cal. App. 3d 297, 101 Cal. Rptr. 83 (1972); *California Fedn. of Teachers v. Oxnard Elementary Schools*, 272 Cal. App. 2d 514, 77 Cal. Rptr. 497 (1969).

84. CAL. GOVT. CODE §§ 3500-11 (West 1966), *as amended*, (West Supp. 1972).

85. FLA. STAT. ANN. § 286.011 (Supp. 1972).

86. 262 S.2d 425 (Fla. 1972).

negotiator for a county board of education could participate in private negotiations with representatives of a teachers' union without violating the Sunshine Law. The court determined that technical compliance with the law was achieved when the board, at a public meeting, voted on and approved, with modifications, the negotiator's recommendations. In holding that the law did not apply to preliminary deliberations and discussions, the court sustained the view of the Dade County circuit court that "meaningful collective bargaining in the circumstances here would be destroyed if full publicity were accorded at each step of the negotiations."⁸⁷

Even if preliminary negotiations may be held in secret, laws requiring public employers to conduct public meetings raise another interesting question: Must a public employer allow the representative of a minority union to make a presentation at a public meeting, and, if so, does this constitute unlawful "negotiating" with a minority representative in derogation of the rights of the exclusive representative? The Wisconsin supreme court dealt with this issue in *Board of School Directors v. Wisconsin Employment Relations Commission*.⁸⁸ The court held that such a presentation, if made on behalf of a minority organization, *did* constitute unlawful "negotiating." Under the school board's regulations a minority-union representative

87. 262 S.2d at 426. "Sunshine" or "right-to-know" laws are not universal. Where they do exist, reconciliation between the open meeting principle and collective bargaining is usually achieved without a court battle. For example, according to the Massachusetts attorney general, that state's "right-to-know" law, MASS. ANN. LAWS ch. 39, § 23A (1966), *as amended*, (Supp. 1971), does not apply to collective bargaining sessions. [1967-1968] MASS. ATTY. GEN. REP. 92.

In Wisconsin, the attorney general has stated:

Whether the teacher salary proposals submitted by the teachers' committee and the counter proposals made by the school board are preliminary in nature and for bargaining reasons need to be discussed in a closed session is basically a question of fact to be decided by the school board. If the board finds that the bargaining process can best be carried on in private, the meeting may be closed. . . . [However,] [w]hen the bargaining period is past, no final action should be taken on the teachers' salary schedule until they are [*sic*] made public and discussed in an open public meeting.

1965 WIS. ATTY. GEN. OP. at vi.

California's open-meeting statute, CAL. GOVT. CODE §§ 54950-60 (West 1966), *as amended*, (West Supp. 1972), provides that secret meetings can be held under certain circumstances. And in New York, the Commissioner of Education determined as early as 1951 that school boards would be permitted to hold executive sessions so long as official actions were taken only at regular sessions. D. WOLLETT & R. CHANIN, *THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS* 4:3-4 (1970). While the relation between open-meeting statutes and collective bargaining is still cloudy in some areas, the Florida experience appears unlikely to be repeated with any great frequency elsewhere.

For discussions of the constitutional dimensions of sunshine laws, see generally Parks, *The Open Government Principle: Applying the Right To Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Note, *Open Meeting Statutes: The Press Fights for the "Right To Know,"* 75 HARV. L. REV. 1199, 1200-03 (1962).

88. 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

could speak on his own behalf, though not in his representative capacity; thus, the court managed to sidestep the troublesome free speech and right-of-petition questions which might flow from a public employer's unyielding refusal to hear third-party public expressions concerning a pending negotiation.

In September 1972, the Wisconsin Employment Relations Commission (WERC) confronted this issue in a more direct fashion. In *Madison Teachers, Inc. v. Joint School District No. 8*,⁸⁹ WERC held that the Madison board of education violated its duty to bargain when it heard a minority representative who addressed a public meeting of the board concerning a "fair-share" (agency shop) agreement, which was being negotiated by the board and the majority union. WERC ruled that the board was not entitled to hear arguments against fair-share agreements until after a specific agreement had been negotiated and only the question of the acceptance of the negotiated agreement by the employees remained. The Commission specifically rejected the contention that this constituted a denial of the minority representative's constitutional rights. The board, it said, had other ways to receive the information presented by the minority representative without violating its duty to bargain, including hearing presentations at times other than during negotiations with the exclusive representative of the unit. This decision is consistent with a fundamental principle of labor relations: in order to gain the rights associated with exclusive representation, employees must accept limitations on other rights, including the right to negotiate with the employer individually or through representatives of employee groups other than the one chosen by a majority of employees.⁹⁰

F. *Determining Who the Public "Employer" Is: The Impact of the Political Process*

Questions relating to the exclusive representation principle and the impact of the Sunshine Laws pale by comparison to the problem of attempting to identify the real public "employer" in any given public sector negotiations.⁹¹ Should the executive branch, which has over-all responsibility for the bureaucracy, be designated as the em-

89. GERR No. 483, at B-3 (Case VIII, No. 15210 MP-107, Dec. No. 11271, Sept. 13, 1972).

90. See, e.g., *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (1969). See generally Oldham, *Organized Labor, the Environment, and the Taft-Hartley Act*, 71 MICH. L. REV. 935, 1010-17 (1973).

91. See Blair, *supra* note 45, at 8-10.

ployer? Or does that title belong to the legislature, which appropriates the money and approves the financial terms of contracts? What role should the personnel division of a civil service system play?

These questions take on great practical importance when the state statute provides sanctions for a refusal to bargain in good faith. One element of good faith bargaining is the presence of bargaining representatives on both sides of the negotiating table who have the authority to make genuine proposals. Of course, final authority need not be possessed by negotiators for either side; for example, it is an accepted practice in the private sector for union representatives to submit a contract for final ratification by the membership before execution. A different situation, however, is faced by public employees when the representative of the public employer lacks even the authority to arrive at a *conditional* agreement. Absent a statute clearly identifying the participants on the public employer's side of the bargaining table, the question must be resolved on a case-by-case basis. A public employee relations board could serve a vital function in this area, by shaping the collective bargaining process through unfair labor practice proceedings.⁹²

A good example of the usefulness of the case-by-case method of establishing the identity of the employer is seen in *Typographical Union v. Personnel Division*,⁹³ decided by the Oregon Public Employee Relations Board (PERB). When the state personnel division refused to recommend approval of the wage adjustments called for in a joint agreement between state printing trade employees and the state printer, an unfair labor practice charge was filed. Even though a contract approved by the personnel division would still be subject

92. Resolution of bargaining disputes by an administrative body such as a public employment relations board is preferable to resolution by the courts for two reasons. First, the procedure is usually speedier and less expensive, and the law, therefore, tends to develop faster. The speed with which disputes are resolved is more important in labor relations than in ordinary civil proceedings, for a labor-management dispute, unlike the typical civil action, is only part of an ongoing relation. Moreover, speedy resolution is desirable not only to settle current disputes and avoid the disruption and disharmony resulting from such actions as strikes, lockouts, and boycotts, but also to clarify the rights of the parties with respect to their future dealings.

A second reason in favor of using public employment relation boards to resolve disputes is that members of these boards are often experts in labor relations. As specialists who are constantly dealing with various facets of their specialty, they are better prepared to deal with the concepts that they are expected to apply than are judges, who are often without any labor relations expertise and who deal with labor cases only sporadically. Labor relations, especially in the public sector, involves public policy considerations as well as technical questions of law. But the role of the courts in resolving public policy questions in this area is better preserved in judicial review of administrative proceedings than in providing an initial forum.

93. GERR No. 400, at B-6 (Case No. C-39, March 31, 1971). For a discussion of this case in the context of delegation of power and scope of bargaining problems, see Blair, *supra* note 45, at 11-15.

to final approval by the governor and the making of the necessary appropriations by the legislature, the Oregon PERB held that the personnel division should have participated in the bargaining process rather than waiting to reject the completed agreement, because the state, as well as the state agencies, is a "public employer" by definition under the Oregon statute.⁹⁴

The Oregon Board quite properly took a functional approach in defining the relation between the employees and the component parts of the employer's authority structure. The Board stressed that "individuals engaged in the actual bargaining process must be persons empowered to present the facts . . . in support of their own position and to weigh and evaluate the arguments . . . presented by their colleagues across the table."⁹⁵ The fact that the Oregon statute contemplates only a conditional agreement did not, in the Board's view, eliminate the employer's obligation to develop a bargaining approach common to all elements of the bureaucracy having an input into the process. The Board noted specifically that "[t]here is nothing to prevent the parties from negotiating to a point at which the governor has either accepted or not accepted a proffered agreement."⁹⁶

Only recently has a state legislature addressed itself to the problem of identifying the employer of state employees. The revised Wisconsin statute provides that "the state shall be considered as a single employer . . . [and that] [i]t is the responsibility of the executive branch to negotiate collective bargaining agreements, and to administer such agreements. . . ."⁹⁷ The statute also spells out the responsibility for the handling of employer functions within the executive branch and for the coordination of collective bargaining activities.⁹⁸ Finally, the Wisconsin law makes it clear that the legislature must take specific steps to approve or disapprove those portions of agreements which require legislative action.⁹⁹ Statutes of this type should help to eliminate the frustration and waste of time and money which occur in those all-too-frequent instances where a union concludes an agreement only to find that it has been dealing with an agency with insufficient authority to negotiate effectively.

While the Wisconsin statute states in detail the tasks that the Wisconsin legislature must perform in public sector bargaining, it

94. ORE. REV. STAT. § 243.711(5) (1971).

95. GERR No. 400, at B-7.

96. GERR No. 400, at B-7.

97. WIS. STAT. ANN. § 111.81(16) (Supp. 1973).

98. WIS. STAT. ANN. §§ 111.80(4), 111.81(16) (Supp. 1973).

99. WIS. STAT. ANN. § 111.92 (Supp. 1973).

also brings out the fact that the role of the legislature in the bargaining process is conceptually ambiguous, absent a statute. On the one hand, the state legislature, or its equivalent in a political subdivision, although it is the final legitimating authority, at least for fiscal matters, is wholly outside the negotiating process, which is completed before the legislature is called upon to act. On the other hand, the need for legislative approval necessarily affects the bargaining process. For example, the bargaining position of the employer is likely to be strengthened if the parties believe that the legislature will not approve settlements beyond a certain percentage or dollar increase over present benefits.

The Wisconsin statute provides an example of how the legislature may not only legitimate public sector contracts, but also participate more directly in the bargaining process. It requires that agreements, once approved by the unions involved, be approved by a joint legislative committee. The committee then introduces bills in both houses to implement those portions of the agreement, such as wage adjustments and fringe benefits, which require legislative approval. If the committee rejects the agreement, or the legislature rejects the resultant bills, the agreement is sent back to the parties for renegotiation.¹⁰⁰ Thus, the parties must remain aware of the attitudes of both the legislative committee and the legislature itself.¹⁰¹

Participation by the legislature in the bargaining process raises the question whether a legislative body can be regarded as the "employer." The legislature, as approving authority, is a part of the same government as the executive branch, which acts as the negotiating authority. May the executive be regarded as the "agent" of the legislature, in the sense that it has actual authority to negotiate only those contracts which the legislature will approve? Should the executive be charged with actual or constructive knowledge of legislative tolerance limits, and should both the executive and the legislature be subject to unfair labor practice charges if the executive negotiates a contract knowing the legislature will disapprove it? These interesting questions were raised with respect to a *local* legislative body in a recent decision by the New York Public Employment Relations Board. In *Board of Trustees of the Ulster County*

100. WIS. STAT. ANN. § 111.92(1) (Supp. 1973).

101. In this respect, the role of the Wisconsin legislature is to be contrasted with that of its New York counterpart. The provision of the Taylor Law requiring legislative approval of the negotiated contract, N.Y. CIV. SERV. LAW § 204-a(1) (McKinney 1973), involves a significantly lower level of legislative participation in the process than the Wisconsin statute provides.

Community College,¹⁰² the college board of trustees agreed to a wage hike in excess of the maximum raise authorized by the county legislature. The legislature then repudiated the authority of the trustees and sought to renegotiate the contract. The hearing officer found that the trustees had in fact exceeded their authority; however, he found that the legislature had committed an improper practice in renouncing the authority of the board and rejecting the contract. By reference to agency principles, the hearing officer determined that the act of the agent (the trustees) should be attributed to the principal (the legislature) where the agent is clothed with apparent authority to negotiate an agreement. This finding of an improper practice was rejected by the New York PERB, on the ground that an agent should be free to agree to a proposal in excess of his authority if he has the good faith belief that his principal may be persuaded to agree also. The decision by the Board did not reject the agency concept, however, and left open the possibility that the Board may return in later cases to the view expressed by the hearing officer that where a legislative body directly involves itself in the negotiating process, such action is reviewable by the Board and may be the subject of an improper practice proceeding. In an earlier New York decision, in which the legislative body did involve itself in the negotiating process, a hearing officer ruled that only the executive branch could be charged with an improper practice since only that branch, and not the corresponding legislature, actually "negotiates."¹⁰³

The *Ulster County Community College* case dealt with the role of a *local* legislative body in the bargaining process. Different questions are raised when dealing with state legislatures. County and municipal governments, even where "home rule" statutes grant considerable freedom of action to localities, are agencies of the state, subject to the superior authority of the state government.¹⁰⁴ State courts, therefore, have more freedom to evaluate the behavior of local legislative bodies according to the dictates of state law than they have to challenge the state legislature on its own ground. Attribution of "employer" status to the state legislature for the purpose of enforcing its own laws against itself is unlikely. But the fact that the legislature may not be a *designated participant* in the bargaining process does not alter the reality of its influence on that process.

102. 4 New York Public Employment Relations Board [hereinafter N.Y. PERB] 4639 (1971) (hearing officer's decision); 4 N.Y. PERB 3749 (1971) (board decision).

103. Town of Huntington, 3 N.Y. PERB 4501 (1970).

104. E. STASON & P. KAUPER, CASES AND MATERIALS ON THE LAW OF MUNICIPAL CORPORATIONS 2 (3d ed. 1959).

Clearly, the nature of government requires that adjustments be made in adapting private sector patterns to public sector negotiations. But these adjustments need not require a wholly different approach to the process. One major problem at present is simply definitional—deciding who the proper parties to the negotiations actually are in any given case. Solutions will come in time through statutory clarification and ad hoc determinations.

A second major problem—the requirement of legislative approval of fiscal matters—is one to which the parties themselves can adjust, just as employers in the private sector have adjusted to the fact that a contract normally is not final until ratified by the union membership. Statutory provisions such as those found in New York and Wisconsin should help the parties to remain aware of the need for such an adjustment.

VI. THE SCOPE OF BARGAINING

From the foregoing discussion, it can be seen that there are numerous troublesome issues yet to be resolved concerning the process of collective bargaining in the public sector. While these issues are not insignificant, more important are the questions related to the range of legally permissible subjects about which the parties may meet and confer or negotiate in the public sector. If, as hereinabove suggested, there is no real difference in the technique of bargaining under most meet-and-confer and collective-negotiations laws, then the crucial inquiry must involve the scope of bargaining under either approach. And even if the process of bargaining differs between meet-and-confer and collective-negotiations states (because the parties negotiate as “equals” only under the latter approach), we are still not told much about the effective scope of bargaining in the states which have opted for the collective-negotiations approach. A state statutory requirement that the parties negotiate as “equals” will be insignificant if the statute also narrowly limits the scope of bargaining. To promise the government employee equality at the bargaining table while at the same time excluding most items relating to wages, hours, and working conditions from the mandatory subjects of bargaining would make collective bargaining for the public sector an illusory gain indeed.

A. “Mandatory” and “Permissive” Subjects

In the private sector, the scope of bargaining is derived from the words “wages, hours, and other terms and conditions of employment,”

found in section 8(d) of the NLRA.¹⁰⁵ Subjects covered by this phrase are deemed to be mandatory, and the employer must bargain with respect to them.¹⁰⁶ Other matters are either permissive or illegal subjects of bargaining.¹⁰⁷ Bargaining with respect to permissive subjects is discretionary for both parties,¹⁰⁸ and neither is required to bargain in good faith to the point at which agreement or impasse is reached.¹⁰⁹ The parties are not explicitly forbidden from discussing matters which are illegal subjects of bargaining, but a contract provision embodying an illegal subject is, of course, unenforceable.¹¹⁰

In the public sector, the NLRA language is frequently incorporated in state statutes to establish the broad outlines of the scope of bargaining. State courts and public employment relations boards have likewise frequently relied upon the mandatory-permissive-illegal distinction, although the distinction probably has little relevance in the *pure* meet-and-confer states, where the employer's duty to consider *any* proposal is not very great. The public sector differs greatly from the private sector, however, in the *method* by which this distinction is delineated. In the private sector, the line between mandatory and permissive subjects of bargaining is drawn on an ad hoc basis, as the NLRB and the courts subject the distinction to constant redefinition and refinement. In the public sector, there is an attempt to accomplish much more by statute, generally in the form of specific restrictions on the subject matter of bargaining. In some cases, state statutes exclude specific matters from the category of

105. 29 U.S.C. § 158(d) (1970).

106. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

107. Normally, the courts and the NLRB have held that unless a subject is likely to have a significant impact on the job rights and security of an employee, it will not be covered by the duty to bargain. Indeed, some "business decisions" are not covered by the duty to bargain even though they may have a real impact on employees' job interests. *E.g.*, *UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). However, the effect of a business decision—such as a decision to move a plant operation or to contract out bargaining unit work—on employees may be held to be negotiable. *E.g.*, *General Motors Corp.*, 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971), *petition for review denied sub nom. UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972).

108. *NLRB v. American Natl. Ins. Co.*, 343 U.S. 395 (1952).

109. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). At least one state has adopted this rule in the public sector as well. In *Mayor Samuel E. Zoll, GERR No. 485*, at B-5 (Case No. MUP-309, Dec. 14, 1972), the Massachusetts Labor Relations Commission held that the city's insistence on "public view" bargaining as a precondition to agreement was a failure to bargain in good faith. See note 87 *supra* for a discussion of the applicability of the Massachusetts "right-to-know" law. See also *Town of Stratford*, Dec. No. 1069 (Conn. St. Bd. Lab. Rel., May 26, 1972), discussed in note 151 *infra*.

110. *NLRB v. National Maritime Union*, 175 F.2d 686 (2d Cir. 1949).

mandatory subjects of bargaining;¹¹¹ presumably, however, these matters are still bargainable on a permissive basis. In other cases, public employers are forbidden altogether from bargaining about certain listed subjects.¹¹² In Wisconsin, the State Employment Labor Relations Act contains both types of restrictions.¹¹³

B. *The Impact of Pre-Existing Legislation and
Civil Service Laws*

Other statutory provisions restrict the scope of bargaining by giving precedence to pre-existing state law or municipal ordinance over a subsequent collective bargaining agreement. For example, the Massachusetts municipal employee bargaining statute provides: "In the event that any part or provision of any such agreement is in conflict with any law, ordinance, or by-law, such law, ordinance, or by-law shall prevail so long as such conflict remains"¹¹⁴ Particularly important among pre-existing laws which may conflict with collective bargaining agreements are civil service statutes and regulations. Nine statutes in eight states apparently give precedence to civil service systems over collective bargaining agreements.¹¹⁵ In two states the collective bargaining agreement is given precedence.¹¹⁶ In Michigan, where the public employee bargaining statute¹¹⁷ makes no mention of precedence, the state supreme court has ruled that those provisions of local civil service laws covering mandatory subjects of bargaining are superseded *pro tanto* by the Michigan Public Employees Relations Act.¹¹⁸ Whether this ruling will influence other states where the statutes do not contain a rule of precedence remains to be seen.

Arguably, of course, a rule of precedence deals with the enforcement of the completed agreement and not with the scope of bargaining *per se*. But such a rule certainly has an impact on the scope of bargaining. It may seriously impair the bargaining process if the

111. *E.g.*, PA. STAT. ANN. tit. 43, § 1101.702 (Supp. 1972).

112. *E.g.*, HAWAII REV. STAT. § 89-9(d) (Supp. 1971).

113. WIS. STAT. ANN. §§ 111.90, 111.91(2)(a)-(b) (Supp. 1973).

114. MASS. ANN. LAWS ch. 149, § 178I (Supp. 1972).

115. CAL. GOVT. CODE §§ 3500 (West 1966), 3525 (West Supp. 1972); KAN. STAT. ANN. § 75-4330 (Supp. 1972); ME. REV. STAT. ANN. tit. 26, § 969 (Supp. 1972); MASS. ANN. LAWS ch. 149, § 178I (Supp. 1972); PA. STAT. ANN. tit. 43, § 1101.703 (Supp. 1972); VT. STAT. ANN. tit. 3, § 905 (1972); WASH. REV. CODE § 41.56.100 (1969); WIS. STAT. ANN. § 111.91(2)(b) (Supp. 1973).

116. CONN. GEN. STAT. ANN. §§ 7-467 to -477 (1972); HAWAII REV. STAT. §§ 89-1 to -20 (Supp. 1971).

117. MICH. COMP. LAWS ANN. §§ 423.201-216 (1967).

118. *Civil Serv. Commn. v. Wayne County Bd. of Supervisors*, 384 Mich. 363, 184 N.W.2d 201 (1971).

public employer believes that certain subjects in issue are not "mandatory" items covered by the duty to bargain. In other words, a public employer presumably will seek to avoid bargaining over matters covered by civil service laws, especially if inundated with a host of other union demands, on the plausible ground that any agreements reached in these areas would be unenforceable because of conflicting civil service rules.

Problems associated with the duty to bargain in the public sector are already too numerous to be compounded by overly broad and inconsistent civil service regulations. While the civil service system was originally designed to favor workers by eliminating patronage and rewarding merit, it has gradually expanded to a point where many systems now cover other aspects of employee relations not essentially related to the merit principle. In other words, the civil service system for many years filled the gap caused by the lack of public sector bargaining. Now that this gap has been filled, a conflict has arisen between the civil service system and the duty to bargain in the public sector. It is fairly clear that if the collective bargaining process is going to have any value at all, the civil service system in its broad expanded form must yield to bargaining. Thus, it may well be that civil service should control, at the utmost, only hiring, promotions, and demotions.

Civil service laws are not the only source of conflict with collective bargaining legislation. Of the other statutes which limit the scope of bargaining, the most interesting, in view of recent developments in Michigan, are the municipal "home rule" statutes. A tug-of-war has recently developed between the Michigan courts and the Michigan Employment Relations Commission over the extent to which municipal residency requirements, passed pursuant to the state's Home Rule Cities Act,¹¹⁹ can restrict the scope of mandatory bargaining. A number of Michigan cities, including Detroit and Pontiac, have passed ordinances requiring certain city employees to reside within the city limits. The principal opposition to these ordinances has come from police officers, and local police officers' associations have placed the ordinances high on their priority lists for negotiations with city officials. The issue has thus been joined: the right of municipalities to require a commitment to the city on the part of certain employees is pitted against the right of those employees to attempt to negotiate a relaxation of that commitment.

In 1970, the Michigan Employment Relations Commission first dealt with the home rule statute, in *City of Flint (Hurley Hospi-*

119. MICH. COMP. LAWS ANN. §§ 117.1-.38 (1967), as amended, (Supp. 1972).

tal),¹²⁰ holding that home rule charter provisions which outlined a uniform pay plan did not relieve the city of the duty to bargain over wages. The following year, in *City of Detroit (DPOA)*,¹²¹ MERC held that the institution of a residency requirement for current employees was a mandatory subject of bargaining. In the meantime, the Michigan supreme court, apparently without considering the effect of its decisions on collective bargaining, was hearing challenges to the constitutionality of such residency requirements. In *Williams v. Detroit Civil Service Commission*¹²² and *Detroit Police Officers Association v. City of Detroit*,¹²³ the court held that such requirements were constitutional and within the prerogative of the municipality to enact and enforce. It was left to the Michigan court of appeals to decide the effect of these decisions on the scope of bargaining. One year later, in *Detroit Police Officers Association v. City of Detroit*,¹²⁴ that court held, *inter alia*, that the residency issue was "no longer mandatorily negotiable."¹²⁵ The Michigan Commission, as of this writing, has had the latest, though probably not the last, word on the issue. In *City of Pontiac (PPOA)*,¹²⁶ MERC ruled that the city was required to bargain with the police officers' association regarding a proposed change in residency requirements. In so doing, MERC limited the court of appeals decision strictly to its facts. Thus, the question of the duty to bargain over residency requirements in Michigan has not been finally resolved.

C. Judicial Limitations on the Scope of Bargaining

Another source of restrictions on the scope of bargaining is narrow judicial interpretation of statutory language. Just as courts have been hesitant to impose a duty to bargain on the public employer, so have they been reluctant to give expansive interpretations to the language governing the scope of bargaining.¹²⁷ The desire to avoid illegal delegations of power, as well as the reluctance to permit employee groups to encroach upon areas entrusted to the discretion of a political agency are unquestionably valid, if often overstated, concerns of the court. These concerns are reinforced by legislative

120. 5 MERC Lab. Op. 348 (1970).

121. 6 MERC Lab. Op. 237 (1971).

122. 383 Mich. 507, 176 N.W.2d 593 (1970).

123. 385 Mich. 519, 190 N.W.2d 97 (1971), *appeal dismissed*, 405 U.S. 950 (1972).

124. 41 Mich. App. 723, 200 N.W.2d 722 (1972).

125. 41 Mich. App. at 728, 200 N.W.2d at 725.

126. 7 MERC Lab. Op. 701 (1972).

127. See, e.g., *Lullo v. Fire Fighters Local 1066*, 55 N.J. 409, 440, 262 A.2d 681, 698 (1970).

policy statements which virtually mandate a conservative approach to statutory interpretation.¹²⁸

Also, statutory deviations from NLRA language have been viewed as bases for restrictive interpretations. Illustrative of this last point is the recent Connecticut case of *West Hartford Education Association v. DeCourcy*,¹²⁹ in which the question was whether a board of education could be required to bargain with respect to the length of the school day and the school calendar. Seizing upon the fact that the Teacher Negotiation Act¹³⁰ defines the scope of mandatory bargaining as "salaries and all other conditions of employment,"¹³¹ instead of using the NLRA wording which also specifically mentions "hours," the Connecticut supreme court ruled that hours of work were not a "condition of employment" under the act.

Unfortunately, many public sector statutory provisions which are at variance with the private sector model do not make clear the legislative purpose behind the language modification. Indeed, some provisions merely appear to reflect the differences in the employment situation seen in the public sectors, but do not otherwise indicate a legislative intention to narrow the scope of bargaining. For example, the Delaware statute covering teachers provides that the public employer has a duty to negotiate in good faith with respect to "salaries, employee benefits, and working conditions."¹³² In other state statutes, however, the language employed is sufficiently ambiguous to make it unclear whether the scope of bargaining was intentionally defined to be more narrow than the definition in the NLRA. In Oklahoma, for instance, teachers and boards of education are required only to bargain with respect to "items affecting the performance of professional services,"¹³³ and the South Dakota public employee rela-

128. In Kansas, for example, the legislature adopted the following legislative findings:

[T]here neither is, nor can be, an analogy of status as between public employees and private employees, in fact or law, because of inherent differences in the employment relationship arising out of the unique fact that the public employer was established by and is run for the benefit of all the people and its authority derives not from contract nor the profit motive inherent in the principle of free private enterprise, but from the constitution, statutes, civil service rules, regulations and resolutions

. . . [T]he difference between public and private employment is further reflected in the constraints that bar any abdication or bargaining away by public employers of their continuing legislative discretion

KAN. STAT. ANN. §§ 75-4321(4)-(5) (Supp. 1972).

129. — Conn. —, 295 A.2d 526 (1972).

130. CONN. GEN. STAT. ANN. §§ 10-153a to -153h (Supp. 1973).

131. CONN. GEN. STAT. ANN. § 10-153b (Supp. 1973).

132. DEL. CODE ANN. tit. 14, § 4008(a) (Supp. 1970).

133. OKLA. STAT. ANN. tit. 70, § 509.6 (Supp. 1971).

tions act requires bargaining only on "grievance procedures and conditions of employment."¹³⁴

In all these cases, the problem is essentially the same: state courts and/or public employee relations boards are forced to develop case law to accommodate the statutory variations. Given the existence of the familiar NLRA model, which I would argue is sufficiently flexible to accommodate public service, the continued enactment of these oddball statutory provisions appears unnecessary. More importantly, these ambiguous provisions may actually deter peaceful and effective bargaining. Faced with unfamiliar terms, which purport to define the subjects of mandatory bargaining, the employer is encouraged to test the parameters of the language by refusing to bargain on borderline issues. The prosecution of these court challenges is no less time-consuming, expensive, or irritating than traditional collective bargaining. Furthermore, even if the employer prevails in a single case, as in *West Hartford*, public employees are not likely to cease pressing their demands at the bargaining table and before the legislature in areas which they believe affect their employment situation.

D. *Statutory Management-Rights Clauses*

Delineating the scope of bargaining is even more difficult where statutory management-rights clauses and other statutory exclusions are involved. While the whole thrust of private sector case law is to define what is bargainable by constant refinement of the term "wages, hours and conditions of employment," statutory exclusions are attempts to define bargainability in terms of what is *not* bargainable. Furthermore, while deviations from NLRA language leave the scope of bargaining unclear, statutory exclusions create even more confusion. Some state statutes, for instance, provide that the public employer has the unfettered right to "maintain the efficiency of government operations."¹³⁵ Others declare that the employer has no duty to bargain with respect to the mission of the agency¹³⁶ or matters of inherent managerial policy.¹³⁷ It surely is not clear what these terms mean. A public employer, for example, may claim that *anything* done by the agency before the advent of collective bargaining gives

134. S.D. COMP. LAWS ANN. § 3-18-2 (Supp. 1972).

135. *E.g.*, HAWAII REV. STAT. § 89-9(d) (Supp. 1971); KAN. STAT. ANN. § 75-4326(d) (Supp. 1972); N.H. REV. STAT. ANN. § 98-C:7 (Supp. 1971); NEV. REV. STAT. § 288.150(2)(e) (1971).

136. *E.g.*, VT. STAT. ANN. tit. 3, § 905(b) (1972); WIS. STAT. ANN. § 111.91(2)(a) (Supp. 1973).

137. *E.g.*, MINN. STAT. ANN. § 179.66(1) (Supp. 1973).

evidence of the "mission of the agency" or was done to "maintain the efficiency of government operations." Operationalizing such language in the context of the objectives of a collective bargaining statute is not only difficult, it is unnecessary.

The foregoing discussion, however, does not lead to the conclusion that management-rights clauses are insurmountable obstacles to bargaining. A recent case in the federal service¹³⁸ suggests that, over time, ambiguous provisions such as those cited above can be reconciled to the requirements of good faith bargaining. Executive Order No. 11,491,¹³⁹ the basic authority for the bargaining rights of federal employees, provides in section 12(b)(4) that management officials of federal agencies retain the right "to maintain the efficiency of the Government operations entrusted to them."¹⁴⁰ The managers of United States Army Corps of Engineers power plants in Missouri and Arkansas invoked this clause to justify scheduling "swing shift" operators in order to avoid payment of overtime and holiday pay to regular operators in the plants. The Federal Labor Relations Council (FLRC), established pursuant to Executive Order No. 11,491 to hear unfair labor practice charges, determined that management had committed an unfair labor practice when it refused to negotiate with respect to its scheduling policies. In responding to the invocation of the management-rights provision, the FLRC stated:

We believe that where otherwise negotiable proposals are involved, the management right in Section 12(b)(4) may not properly be invoked to deny negotiations unless there is a *substantial demonstration* by the agency that increased costs or reduced effectiveness in operations are inescapable and significant and are not offset by compensating benefits.¹⁴¹

The FLRC may have discovered a method of dealing with statutory management-rights clauses that state public employee relations boards would do well to adapt. In effect, the FLRC ruled that management is free to invoke reserved-rights provisions at any time, but a relatively stiff burden will be placed on the employer to show that such an invocation is not capricious and that negotiations over the item in question would seriously deter the smooth functioning of the employer's operations.

138. IBEW Local 2219, GERR No. 482, at A-2 (No. 71A-46, Fed. Lab. Rel. Council, Nov. 20, 1972).

139. 3 C.F.R. 262 (1973).

140. 3 C.F.R. 269 (1973).

141. GERR No. 482, at A-2 (emphasis added).

E. The Expanding Scope of the Duty To Bargain

Actually, the tendency of both meet-and-confer and collective-negotiations states to limit the scope of bargaining rests on a fear that institutionalizing private sector practices in the public sector may ultimately pervert the political process. As the decision regarding allocation of resources in the public sector is a political rather than merely an economic choice, it has been argued that full collective bargaining in the public sector may give labor the means to enforce its will to the detriment of other, less highly organized suitors for government funds.¹⁴²

It cannot, of course, be controverted that, in theory, decisions on governmental priorities are properly political and should be responsive to the desires of the constituency as a whole rather than the values of a labor union. Yet, in reality, the process of resource allocation in government is the outcome of a tug-of-war between many organized interest groups.

Current developments in public sector labor laws indicate that we may expect to see a widening of the scope of bargaining in all states. The experience in Michigan furnishes ample evidence that public sector bargaining can be satisfactorily regulated under the private sector concept of the duty to bargain. A state public employment relations board is usually quite capable of deciding, on the basis of private sector precedents and public sector bargaining experiences, which subjects should be deemed "mandatory" for bargaining purposes. The case-by-case decision-making approach on mandatory subjects is vastly superior to a rigid legislative limitation on the scope of bargaining, because if experience proves the initial judgment to be erroneous, it is easier for a state board to reverse itself than it is to get a modification of a state statute in the legislature.

In this regard, one may ask whether it is ever sensible to attempt to limit the scope of bargaining by statute. The collective bargaining process is in part a therapeutic process, and it should permit the parties to address fully all problems which affect the bargaining relationship. If the employer is opposed to a given union demand, he can discuss the problem raised, and then, if appropriate, he can persist in rejecting it. This is a more satisfactory approach, in terms of achieving stable and harmonious labor relations, than to have the employer refuse to discuss an issue in the first instance because it is legally nonnegotiable. It may be worthwhile to recall the dissent of

142. H. WELLINGTON & R. WINTER, *supra* note 11, at 29-32.

Justice Harlan in *NLRB v. Wooster Division of Borg-Warner*,¹⁴³ where he argued:

The bargaining process should be left fluid, free from intervention . . . leading to premature crystallization of labor agreements into any one pattern of contract provisions, so that these agreements can be adapted through collective bargaining to the changing needs of our society and to the changing concepts of the responsibilities of labor and management.¹⁴⁴

At the present time, the predicted trend toward a more liberal approach to the scope of bargaining in the public sector already appears to be developing. At the federal level, for example, a "Scope of Bargaining Project," currently underway at the Civil Service Commission, is preparing proposals for streamlining the *Federal Personnel Manual*, which is now the source of extensive restrictions on bargaining in the federal service. Civil Service Commission Chairman Robert Hampton recently outlined both the nature of these restrictions and the goals of the "Scope of Bargaining Project" in a speech before the Personnel Directors' Conference of the Federal Executive Institute, as follows:

The legal limitations which are imposed on the scope of bargaining in the Federal sector by "applicable laws and regulations" account for the significant and fundamental differences from labor-management relations in private industry. Many of the basic terms and conditions of employment which typically are fashioned by the collective bargaining process in the private sector are determined by law or regulation in the Federal sector. These include:

—Basic economic items such as pay, hours, certain fringe benefits and retirement.

—Fundamental personnel policies such as merit staffing, job classification, performance rating and layoff.

—Protection of individual job security such as through statutory appeal rights to the Civil Service Commission.

. . . .
The Objective of the Scope of Bargaining project is to remove barriers in the [*Federal Personnel Manual*] to negotiations, not to determine what is negotiable or to come up with a laundry list of negotiable items. Instead, the project is designed to (1) pin-point [Civil Service Commission] policies and regulations that might be undesirably restrictive, and (2) suggest how they might be changed to broaden or remove uncertainty about the scope of bargaining in the Federal Service.¹⁴⁵

143. 356 U.S. 342 (1957).

144. 356 U.S. at 358-59.

145. Remarks of Civil Service Commission Chairman Robert Hampton, 1972 Con-

At the state level, the public employment relations boards and courts in several states, notably Michigan, New York, Wisconsin, and Pennsylvania, have been in the forefront of the movement toward expanded public sector bargaining. In 1972, the New York court of appeals, in a landmark decision, *Board of Education v. Associated Teachers of Huntington*,¹⁴⁶ ruled that, in light of the Taylor Act¹⁴⁷ (governing public sector bargaining generally), a school board had authority to enter into a collective bargaining agreement granting benefits to teachers, even though there was no *specific* statutory authorization to do so. In reaching this result, the court stated that

the validity of a provision found in a collective agreement negotiated by a public employer turns upon whether it constitutes *a term or condition of employment*. If it does, then, the public employer *must* negotiate as to such term or condition and, upon reaching an understanding, must incorporate it into the collective agreement unless some statutory provision circumscribes its power to do so.

... Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that act should be limited, in any way, except in cases where some other applicable statutory provision *explicitly and definitely* prohibits the public employer from making an agreement as to a particular term or condition of employment.¹⁴⁸

Notwithstanding the importance of the New York court's decision, most of the progress in defining the scope of bargaining in the public sector is an accomplishment of state labor boards.¹⁴⁹ By far, the class of public employees who have most actively sought to test the scope of mandatory bargaining before state boards has been the public school teachers, and it is in this area that the boards have made

ference of Directors of Personnel, Federal Executive Institute, Charlottesville, Va. (April, 1972), excerpted in GERR No. 450, at E-1, E-2, E-4 (May 1, 1972).

146. 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972).

147. N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973).

148. 30 N.Y.2d at 127, 129, 282 N.E.2d at 112-13, 331 N.Y.S.2d at 21, 23 (emphasis added).

149. There are two types of state labor boards in the public sector: those dealing with both private and public sector questions and those handling only public sector matters. There are small but sometimes significant differences in the decisions which emanate from each type of board. Boards which deal with both sectors are more willing to follow private sector precedents than boards which deal only with the public sector. For example, the Michigan Employment Relations Commission, which hears cases from both sectors, is inclined to be more generous in upholding a union's right to bargain with respect to any particular question than is the New York Public Employment Relations Board, whose jurisdiction is more limited. Compare *City of Detroit*, 3 MERC Lab. Op. 492 (1968), with *West Irondequoit Bd. of Educ.*, 4 N.Y. PERB 3725, *affd. on rehearing*, 4 N.Y. PERB 3753 (1971).

the greatest expansion of the scope of bargaining. One of the first cases which suggested that the scope of management discretion over educational policy is not as broad as had been previously thought was a Michigan trial examiner's decision in *North Dearborn Heights School District*.¹⁵⁰ Before the case was ultimately settled, the examiner caused a bit of a furor in Michigan education circles by holding all fourteen of the submitted issues to be bargainable, including curriculum, classroom schedules and class sizes, selection of textbook materials, and a number of other subjects formerly thought to be within the exclusive discretion of the board of education. While no labor board decision has gone as far since, the fear that collective bargaining over some of these matters may lead to abdication of the school board's responsibility and a loss of local control over schools has apparently lessened. Increasingly, formerly permissive or forbidden subjects have become mandatory. The Pennsylvania Labor Relations Board recently reversed an earlier decision by holding that five of twenty-one formerly nonbargainable subjects were negotiable and that the other sixteen "may be bargainable."¹⁵¹

Public education provides an excellent environment for the development of the case-by-case method of defining the scope of bargaining. Such matters as the length of the school day, the academic calendar, classroom size, and extra-curricular assignments clearly relate to wages, hours, and other terms and conditions of employment.

150. 1 MERC Lab. Op. 434 (1966). Compare *Aberdeen Educ. Assn. v. Aberdeen Bd. of Educ.*, 82 L.R.R.M. 2287 (S.D. Cir. Ct. 1972). In that case, the Aberdeen Education Association submitted a list of fifteen items for negotiation. The board of education replied with a list of four items, refusing to negotiate on such items as elementary conferences, teachers' aides, class size, audio-visual expansion, school-wide guidance and counseling programs, mandatory retirement of administrators, elementary planning periods, and budget allowances. A South Dakota circuit court upheld the board's refusal, ruling that these were not proper subjects for bargaining.

151. *State College Area School Dist., GERR No. 464, at B-2* (Case No. PERA-G-929-C, June 26, 1972). The scope of mandatory bargaining may include not only substantive issues, but also "procedural" questions that have to do with the conduct of negotiations. This point was recently made by the Connecticut State Board of Labor Relations, in *Town of Stratford*, Dec. No. 1069 (May 26, 1972). The case involved a dispute between the town and four unions representing municipal employees over the legality of an ordinance requiring the publication of union bargaining proposals. In ruling that the ordinance violated the Connecticut Municipal Employee Relations Act, CONN. GEN. STAT. ANN. §§ 7-467 to -477 (1972), the Board held that preliminary arrangements for negotiation, including publicity, constituted a mandatory subject of bargaining under the Act. The town ordinance was therefore held to be a prohibited practice, since it had the effect of unilaterally establishing the ground rules for negotiation. The Board rejected the town's contention that the ordinance governed only a matter of internal communications, even though one of the aims of the ordinance was to keep the town council informed of the progress of negotiations. The Board also held that the Connecticut "right-to-know" statute, CONN. GEN. STAT. ANN. §§ 1-19 to -21 (1972), did not require public disclosure of bargaining proposals. These proposals, said the Board, "do not automatically and immediately become public records." Dec. No. 1069, Slip Op. at 8.

Yet, they also are matters closely connected with educational policy, usually considered to be within the authority of the school board. This potential overlap of management functions with bargainable subjects leads to some rather fine line-drawing by labor boards as they attempt to strike a proper balance "between the duty of elected officials to make decisions for the entire electorate and the statutory right of employees to negotiate items directly affecting terms and conditions of employment."¹⁵²

The difficulty of striking this kind of balance is illustrated by the New York PERB decision in *West Irondequoit Board of Education*,¹⁵³ where the principal issue was class size. The hearing officer determined that class size was a mandatory subject, since it was an "integral component of the working environment."¹⁵⁴ The Board, however, modified the order, holding that class size was a policy decision. In so doing, it drew a distinction between teaching load, a mandatory subject of bargaining, and class size—a result which provoked the dissenting member to observe that "the impact of numerical limitations of class size upon teaching load is so direct as to make a line of demarcation impossible."¹⁵⁵

152. *West Irondequoit Bd. of Educ.*, 4 N.Y. PERB 4606, 4609 (1971) (hearing officer's decision and recommended order).

153. 4 N.Y. PERB 3725 (1971), *affd. on rehearing*, 4 N.Y. PERB 3753 (1971) (board decision and order).

154. 4 N.Y. PERB at 4609.

155. 4 N.Y. PERB at 3728. The problem of the negotiability of questions of class size and related issues was recently encountered by the Hawaii Public Employment Relations Board (HERB) in two cases. Like its New York counterpart, HERB experienced line-drawing difficulties in these areas. HERB agreed with the New York Board that class size was a "hybrid issue," but it came to the opposite conclusion regarding its bargainability. After balancing the respective interests of the parties, HERB held class size to be a mandatory subject of bargaining. *Hawaii State Teachers Assn.*, GERR No. 480, at E-1 (Case No. CE-05-4, Dec. No. 22, Oct. 24, 1972).

In the second case, *Petition for Declaratory Ruling by the Department of Education*, GERR No. 487, at B-9 (Case No. DR-05-5, Dec. No. 26, Jan. 12, 1973), however, HERB held similar issues to be nonbargainable, again in contrast to New York precedent. The Hawaii State Teachers' Association, under a reopener provision of the contract, had demanded that the teachers be granted preparation periods within the students' instructional day and that workloads be limited. HERB referred to its earlier decision, which it justified by noting that

[n]otwithstanding its admitted relation to educational policy, [HERB] found in that instance that the element of impact on teachers' working conditions was great, while the imposition of an average, statewide class size ratio had minimum impact on the [board of education's] right to establish educational policy.

GERR No. 487, at B-13. The Hawaii Board found this rationale not to be controlling in the second case, however. It said that the teacher workload proposal would force the board of education to hire teachers and expand facilities regardless of its right and duty to maintain efficient operations. HERB reasoned that

when the [board of education] is required to utilize methods which would cause deterioration of the learning environment of the students, such as placing two teachers in the same classroom or increasing team teaching regardless of a teacher's

Where line-drawing is difficult and statutory language gives little guidance, private sector precedents often become a compelling recourse. In *City School District of the City of New Rochelle*,¹⁵⁶ the New York PERB closely adhered to private sector precedent in upholding the right of a school board to make budget cuts resulting in the termination of the services of a number of teachers. The Board noted that such budget cuts "obviously" affect terms and conditions of employment. The Board concluded however that "the decision to curtail services and eliminate jobs is not a mandatory subject of negotiations, *although the employer is obligated to negotiate on the impact of such decision on the terms and conditions of employment of the employees affected.*"¹⁵⁷ Evident in this decision was the Board's reliance on the Supreme Court's decision in *Fibreboard Paper Products Corp. v. NLRB*.¹⁵⁸

The recent MERC decision in *Westwood Community Schools*,¹⁵⁹ which may prove to be a landmark opinion, suggests a two-part balancing test for determining whether a subject falls within management prerogative or whether it is a term or condition of employment and therefore a mandatory subject for bargaining. The tests are: "(1) Is the subject of such vital concern to both labor and management that it is likely to lead to controversy and industrial conflict? And (2) is collective bargaining appropriate for resolving such issues?"¹⁶⁰ At least two alternative readings could be given to the *Westwood* test. On the one hand, the test is offered as a substitute for the mandatory-permissive distinction utilized in the private sector. Since that distinction is merely a shorthand way of determining, on an ad hoc basis, whether the employer *must bargain* over

ability to team teach, it becomes obvious that the [board's] right and duty to provide the best educational system possible is being interfered with.
GERR No. 487, at B-13.

The opposite results of the New York and Hawaii Boards are partially explained by the existence of HAWAII REV. STAT. § 89-9(d) (Supp. 1971), which prevents public employers from agreeing to proposals that would restrict their rights to direct employees and maintain an efficient government operation. However, it is not clear that this management-rights clause wholly explains the contrasting outcomes. It appears that two Boards have looked at similar facts and, using different but equally plausible reasons, have arrived at opposite conclusions.

156. 4 N.Y. PERB 3704 (1971).

157. 4 N.Y. PERB at 3706 (emphasis added).

158. 379 U.S. 203 (1964). See also *City of Flint*, 7 MERC Lab. Op. 913 (1972) (City Civil Service Commission violated Michigan Public Employment Relations Act by refusing to bargain over the effects of reinstated residency requirements on city employees).

159. 7 MERC Lab. Op. 313 (1972).

160. 7 MERC Lab. Op. at 318-19.

a given subject, the *Westwood* test may not be substantially different from the private sector rule, but simply another and possibly a more flexible formulation designed to reach the same end. Yet, a more innovative interpretation was suggested by the language of the Commission itself:

A balancing approach to bargaining may be more suited to the realities of the public sector than the dichotomized scheme—mandatory and non-mandatory—used in the private sector. [The private sector] scheme prohibits the use of economic weapons to compel agreement to discuss non-mandatory subjects of bargaining, but strikes are permissible once the point of impasse concerning mandatory subjects of bargaining is reached. Economic force is illegal in the public sector In Michigan, in the public sector, economic battle is to be replaced by invocation of the impasse resolution procedures of mediation and fact finding.

An expansion of the subjects about which the public employer ought to bargain, unlike the private sector, should not result in a corresponding increase in the use of economic force to resolve impasses. In the absence of legal public sector strikes, our only proper concern in the area of subjects of bargaining is whether the employer's management functions are being unduly restrained. All bargaining has some limiting effect on an employer.

Therefore, we will not order bargaining in those cases where the subjects are demonstrably within the core of entrepreneurial control. Although such subjects may affect interests of employees, we do not believe that such interests outweigh the right to manage.¹⁶¹

The Commission's juxtaposition of the duty to bargain and the strike proscription impliedly presents the novel suggestion that the scope of bargaining ought to be *broader* in the public sector than in the private sector. According to this interpretation, since public employees are ostensibly prevented from using the strike, or the threat of a strike, to gain leverage at the bargaining table, there is no point in severely restricting the subjects which may be brought up in negotiations. The public employer cannot be penalized by work stoppages for taking a hard-line bargaining position, nor is it compelled to agree with any position taken by the employees' union on any subject. Therefore, if the strike proscription is in effect *and is enforced*, the agenda at the bargaining table should be open to virtually any subject. The government, it may be suggested, has the last word on the composition of the contract in any case, either because the public employer has agreed to its terms, or because the legislature must finally approve the contract.

Certainly, the language of the *Westwood* test suggests a very broad scope for bargaining: the scope of bargaining may include any

161. 7 MERC Lab. Op. at 320-21.

subject that "is likely to lead to controversy and industrial conflict." Arguably, such language includes a number of subjects not within the definition of "wages, hours, and terms and conditions of employment"—the scope of mandatory bargaining in the private sector. Instead of being a different method of formulating the mandatory-permissive distinction, therefore, the *Westwood* test may in fact foreshadow a movement to free public sector bargaining from the confines of this distinction.

One caveat must be added, however. The validity of the second interpretation of the *Westwood* test depends on not only the *existence*, but also the *effectiveness* of the strike proscription. In those states where strikes are legal,¹⁶² the *Westwood* test would seem inapplicable. In those states where strikes are illegal, but the proscription is not enforced, the application of the *Westwood* test would seem to give public unions an unfair advantage at the negotiating table, perhaps enabling them to coerce agreement on subjects that in the private sector would not be mandatory subjects of bargaining. In states such as New York, however, where the strike proscription seems to be enforced with some vigor, the broader reading of the *Westwood* test may be of some value in delineating the parameters of the duty to bargain.

VII. THE DURATION OF THE DUTY TO BARGAIN

Once it has been established that a subject is a mandatory or permissive subject of bargaining, the next issue is: When may an employer refuse to bargain further and take unilateral action instead?

In the private sector, an employer cannot take unilateral action with regard to a mandatory subject where there has been no bargaining. However, following negotiations to a point of impasse on a mandatory subject, the employer can take unilateral action, so long as it does not exceed the terms of his final offer to the union.¹⁶³

In the private sector, it has also generally been held that an employer may take unilateral action at any time with respect to a permissive subject.¹⁶⁴ These rules would seem applicable in those

162. See note 40 *supra* and accompanying text.

163. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610 (1st Cir. 1963). Cf. *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949).

164. *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). But see *District 1, Marine Engrs.*, Docket No. BCB-91-71, Dec. No. B-1-72 (N.Y. City Office of Collective Bargaining, Jan. 7, 1972), in which it was held that, during the course of contract negotiations, a public employer may not take unilateral action with respect to a "permissive" subject which was covered by a provision in the parties' *expired* collective bargaining agreement until after the conclusion of impasse panel proceedings.

states where the pure collective-negotiations model regulates the public sector. In *pure* meet-and-confer states, a public employer presumably is free to implement unilaterally any proposals once the statutory obligation to discuss them with the union has been satisfied. In the *modified* meet-and-confer states, there is simply no precedent to aid in the determination of how long an employer must confer with the union in order to satisfy the obligation to "meet and confer in good faith." It may be assumed that the obligation is satisfied once it can truly be said that the employer has seriously considered all of the union's proposals that are properly the subject of bargaining. But whether there is an obligation to meet and confer to a point of impasse may depend upon the terms of the governing statute.¹⁶⁵

Most public employers in jurisdictions which require collective negotiations must bargain at least to impasse. However, the duration of the duty to bargain in the public sector may extend beyond impasse because most states and the federal government prescribe elaborate impasse resolution mechanisms, including mediation, fact-finding, legislative hearings, and compulsory arbitration, which may be invoked following impasse. Both the public employer and union are required to participate in the impasse procedures, once invoked, in a further effort to reach a mutually satisfactory settlement. Impasse procedures thus clearly contemplate further "negotiations" by the parties even where both sides have declared an impasse. As a result, a public employer may not be able to take unilateral action with regard to a mandatory subject, if at all, until after all impasse procedures have been exhausted.¹⁶⁶

165. The question of when an impasse has been reached was recently dealt with in the Connecticut case of *West Hartford Educ. Assn. v. DeCourcy*, — Conn. —, 295 A.2d 526 (1972):

Some bargaining may go on even though the parties are unable to agree on many topics. But, only if the deadlock on the critical issue demonstrates that there is no realistic possibility that further discussions will be fruitful in bringing the parties together generally on salaries and other conditions of employment can we conclude that there is an impasse.

— Conn. at —, 295 A.2d at 542. This definition does not appear too different from the one used in the private sector. In *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (1963), the Fifth Circuit defined an impasse as "a state of facts in which the parties, despite the best of faith, are simply deadlocked." 318 F.2d at 482. The factors relevant to the determination of whether an impasse exists should include: good faith bargaining up to the point of deadlock; willingness to continue bargaining if it appears to offer hope of resolving the deadlock; disagreement on all outstanding issues, or at least on all major issues; and willingness to call in a mediator if necessary. In general, it must appear that, despite the best efforts of the parties, there is no real prospect of an immediate resolution of the problem through bargaining. See Comment, *Impasse in Collective Bargaining*, 44 TEXAS L. REV. 769 (1966).

166. Cf. District 1, Marine Engrs., Docket No. BCB-91-71, Dec. No. B-1-72 (N.Y. City Office of Collective Bargaining, Jan. 7, 1972), discussed in note 164 *supra*.

In *City of Dearborn*,¹⁶⁷ the Michigan Employment Relations Commission firmly established the duty to bargain beyond impasse for Michigan by ruling that a public employer failed to satisfy its obligation to bargain in good faith when it refused to negotiate over the recommendations contained in a fact finder's decision. In its decision, MERC held that the mediation provision of the Michigan Public Employment Relations Act¹⁶⁸ "implicitly incorporates fact finding into the collective bargaining process as it is contemplated by the obligation of the duty to bargain."¹⁶⁹ The Commission went on to say:

Just as a strike may create conditions in which the parties would be more willing to make concessions to compromise the matters in difference, the fact finder's recommendations may enlighten or persuade them of the reasonableness or unreasonableness of their bargaining position. The fact finder's report, thus, is the functional equivalent of a strike and may change the factual situation regarding "the negotiation of an agreement, or any question arising thereunder." . . . It must be given the same serious consideration as the initial bargaining proposals. Therefore, there is an affirmative obligation to bargain in good faith about the substantive recommendations of the report of a statutory fact finder.¹⁷⁰

The city was held to have violated its obligation to bargain after impasse because "[a]lthough the City demonstrated a willingness to attend conferences and discuss the fact finder's report, it did not make a serious attempt to reconcile its differences with the Union."¹⁷¹ The city was ordered to bargain; however, the Commission agreed with the city that it had no statutory authority to order the city to implement the fact finder's recommendations as a remedy for the refusal to bargain.¹⁷²

Additional support for the proposition that the duty to bargain in the public sector extends beyond impasse is provided by *East Hartford Education Association v. East Hartford Board of Education*.¹⁷³ The board and the association in this case failed to reach agreement on a contract, even after mediation was invoked and the dispute was submitted to nonbinding arbitration. Both parties re-

167. 7 MERC Lab. Op. 749 (1972).

168. MICH. COMP. LAWS ANN. § 423.207 (1967).

169. 7 MERC Lab. Op. at 757.

170. 7 MERC Lab. Op. at 758.

171. 7 MERC Lab. Op. at 759.

172. 7 MERC Lab. Op. at 760. This finding is analogous to the Supreme Court's decision in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (NLRB not authorized by law to compel an employer to agree to a dues checkoff provision as a remedy for bad faith bargaining).

173. GERR No. 484, at B-8 (No. 17 82 87, Hartford County, Conn., Super. Ct., Nov. 10, 1972).

jected parts of the arbitrator's award, and, at that point, the board refused to bargain further, claiming its legal duty had ceased. In granting the association's petition for an injunction, Judge Naruk said, "To argue that a board of education or teachers' union that remains obdurate throughout the statutory procedures provided for has complied with the policy of the act is to exalt form over substance."¹⁷⁴

East Hartford must be analyzed in light of the particular statutory procedures provided. The final step of the impasse procedure in the Connecticut teachers' bargaining law provides only for advisory arbitration.¹⁷⁵ Where statutes contain provisions for final and binding arbitration,¹⁷⁶ the problems encountered in *East Hartford* are unlikely to arise, for unless the arbitrator exceeds his authority, the issuance of an award determines the composition of the contract. Statutes containing nonbinding settlement procedures are much more common, however. Where these statutes are controlling, the import of *East Hartford*, to the extent it is followed elsewhere, may be that the parties *may never* reach the point where unilateral implementation is permissible. At the very least, the case stands for the proposition that *mere* participation in statutory impasse procedures does not relieve a party of the duty to bargain in good faith. An unyielding posture, characteristic of the state of impasse in the private sector, may not be tolerable in the public sector.

The strike proscription, which is responsible for the suggestion that there is a duty to bargain beyond impasse in the public sector, is also the basis for New York holdings that at least some provisions of an *expired* contract carry over until a new contract can be negotiated. In *Board of Education v. Connecticut Teachers Association*,¹⁷⁷ the supreme court for Suffolk County held that the board was required to arbitrate a dispute notwithstanding the expiration of the contract containing the arbitration clause. The court stated that

[i]f public employees are prohibited from striking then they must be protected during the hiatus between the expiration date of the old contract and the signing of a new collective bargaining agreement. . . . Thus employees, who comply with the law, are entitled to the maintenance of the status quo during the course of negotiations.¹⁷⁸

174. GERR No. 484, at B-10.

175. CONN. GEN. STAT. ANN. § 10-153f(c) (Supp. 1973).

176. E.g., MICH. COMP. LAWS ANN. §§ 423.231-.247 (Supp. 1972).

177. 81 L.R.R.M. 2253 (1972).

178. 81 L.R.R.M. at 2254. Cf. District 1, Marine Engrs., Docket No. BCB-91-71, Dec. No. B-1-72 (N.Y. City Office of Collective Bargaining, Jan. 7, 1972), discussed in note 164 *supra*.

The New York PERB has reasoned similarly with respect to other contract provisions. In *Triborough Bridge & Tunnel Authority*,¹⁷⁹ PERB upheld a hearing officer's decision that the authority could not refuse longevity increases to employees whose anniversaries arose after the expiration of a collective bargaining agreement and before a new one could be negotiated, noting:

[T]he statutory prohibition against an employee organization resorting to self help by striking imposes a correlative duty upon a public employer to refrain from altering terms and conditions of employment unilaterally during the course of negotiations. *This duty of an employer in the public sector to refrain from self help is greater than is the similar duty of private sector employers.*¹⁸⁰

VIII. ENFORCEMENT OF THE DUTY TO BARGAIN

Most collective-negotiations states and some modified meet-and-confer states¹⁸¹ now provide for the enforcement of the duty to bargain by codes of unfair labor practices, which are often patterned after section 8 of the NLRA and administered by state labor relations boards. In Minnesota the remedy for unfair labor practices is an action in district court.¹⁸² In Oregon, a refusal to bargain in good faith is not specifically made an unfair labor practice but is subject to fact-finding hearings by the Oregon PERB.¹⁸³ In a number of other states, however, no unfair labor practices are stipulated;¹⁸⁴ presumably, the aggrieved party in these cases should seek equitable relief in court, provided that the statute otherwise requires good faith bargaining.

Whatever the bargaining obligation placed upon public employers and employees, it must be made inescapable. Strict enforcement is particularly important in view of the fact that strikes—even those provoked by a public employer's unfair labor practice—are ordinarily prohibited in absolute terms.¹⁸⁵ But effective enforcement is difficult where legislatures and courts are inclined to stress the differences between public and private sectors to the end of limiting the effectiveness of the bargaining process in the public sector. For example, good faith bargaining cannot thrive when public employers are led to believe that they may escape the consequences of a bad

179. 5 N.Y. PERB 3064 (1972).

180. 5 N.Y. PERB at 3064-65 (emphasis added).

181. E.g., KAN. STAT. ANN. § 75-4333 (Supp. 1972).

182. MINN. STAT. ANN. § 179.68(1) (Supp. 1973).

183. ORE. REV. STAT. § 243.745 (1971).

184. E.g., N.H. REV. STAT. ANN. ch. 98-C, §§ 1-7 (Supp. 1971); S.D. COMP. LAWS ANN. §§ 3-18-1 to -17 (Supp. 1972).

185. E.g., MINN. STAT. ANN. § 179.68(1) (Supp. 1973).

bargain by a postnegotiations court challenge on the ground that the disputed contract was ultra vires. In such an atmosphere, the employer may be tempted to choose the easy path of agreeing to contract provisions with which it cannot comply and which it has no intention of honoring. Precedents such as *Huntington Teachers*,¹⁸⁶ in which the New York court of appeals flatly rejected the board of education's contention that it lacked authority to agree to the challenged provisions can only enhance effective collective bargaining. The public employer must be convinced that it will be required to live with whatever agreement is executed.

The need to appropriate public money to pay for negotiated increases in wages and benefits is another characteristic unique to the public sector that creates enforcement problems. It may be conceded that, without its consent, a state legislature may not be compelled to make appropriations; however, a public employer should not be able to use a failure to appropriate as an excuse for either a refusal to bargain or the total repudiation of an existing agreement. Rather, both parties should be expected to make whatever adjustments are necessary to accommodate the financial limitations of the employer. In other words, the requirement of good faith bargaining should not terminate in the face of fiscal obstacles.

An example of the type of adjustment that parties can make to deal with financial limitations was seen in the Massachusetts decision, *Norton Teachers' Association v. Town of Norton*.¹⁸⁷ In that case, the teachers were paid below the negotiated salary rate during the first year of the contract because of an insufficient legislative appropriation. As a consequence, the agreement was amended to make an appropriate increase in the salaries for the subsequent year. The Massachusetts supreme court upheld the authority of the school committee to agree to the amended contract on the basis of its authority to manage the public schools. The court prohibited the town from withholding the necessary appropriation, which was otherwise available, to cover the salary increases; the wage obligations were seen as being no different from any other public debt.

Where public employers have attempted to use financial considerations as excuses for refusing to bargain or for repudiating an agreement, courts and labor boards have recently exhibited a willingness to intervene. In a recent Michigan case, *City of Flint*,¹⁸⁸ the city refused to bargain with the general employees of the municipality pending arbitration of a dispute involving the city firemen and possi-

186. See text accompanying notes 146-48 *supra*.

187. — Mass. —, 279 N.E.2d 659 (1972).

188. 7 MERC Lab. Op. 240 (1972).

ble arbitration with police. The city claimed that it could not make a wage offer since it would not know how much money was available until after the arbitration. The Michigan Employment Relations Commission, however, determined that the city could not refuse to bargain with one group of employees because of the financial uncertainty resulting from a dispute with another group. The New York PERB reached an analogous result in *City of Albany*.¹⁸⁹

The lesson of the Michigan and New York cases is clear: financial uncertainty is no justification for a total refusal to bargain. It is just as clear, however, that such uncertainty can be a basis for a hard-line position in negotiations. Hard bargaining is not in itself an unfair labor practice, even in the private sector.¹⁹⁰ The public employer can take appropriations cutbacks into consideration in bargaining, just as a private employer can take a sales decrease or a decline in profits into account. Similarly, the public employer can take into consideration the impact of bargaining on other units, as in cases where pattern settlements are the rule or wage-parity agreements are in effect.¹⁹¹ But there is a line between hard bargaining and no bargaining, and vigorous enforcement of the duty to bargain can help to clarify the contours of that line.

It is increasingly apparent in the developing case law that once a contract has been signed, the public employer must, in effect, "adopt" the contract and do everything reasonably within its power to see that it is carried out. One way to "adopt" is for the public employer to make economic benefits under the contract a priority item in its budget. Illustratively, in *Board of Education of the City of Buffalo*,¹⁹² the New York PERB held that the board of education did not have complete discretion to rearrange school programs following the legislature's grant of a smaller appropriation than had been requested.

189. 5 N.Y. PERB 3061 (1972) (board decision), *affg.* 5 N.Y. PERB 4537 (1972), in which the hearing officer ruled that budgetary uncertainty was no excuse for a refusal to bargain on wage demands, especially since the amount of available funds would not be known before the statutory impasse procedure was to come into effect. The hearing officer stated that City School Dist. of the City of New Rochelle, 4 N.Y. PERB 3704 (1971) (discussed in text at notes 156-58 *supra*),

countenances some delay by a fiscally troubled employer in submitting negotiating counterproposals on economic matters But *New Rochelle* cannot be read as absolving an employer of its obligation to submit any counterproposals on salaries throughout an entire course of negotiations

5 N.Y. PERB at 4541.

190. *Dierks Forests, Inc.*, 148 N.L.R.B. 923 (1964).

191. *City of Detroit (DPOA)*, 7 MERG Lab. Op. 1053 (1972). The city could take into consideration a previous arbitration award granting firemen and police parity in pay. It was, therefore, not an unfair labor practice for the city to bargain on the basis that whatever salary increases the police could win would automatically go to firemen as well.

192. 4 N.Y. PERB 4634 (1971).

Mandatory subjects covered in the contract with the union were held to take precedence over nonmandated programs in the allocation of money under a less-than-fully-funded budget. This notion was also recently explored—in great detail—in *State v. AFSCME Local 1726*¹⁹³ where the court ruled that since the subject of health insurance was within the scope of bargaining, a provision dealing with health insurance in a collective bargaining agreement was lawful and the State Department of Health and Social Services was required to find the funds to implement the agreement. Signing the agreement, the court noted, obligated the Department to “pursue every step within its power to see that the insurance is provided.”¹⁹⁴

A second method of “adoption” is for the public employer to ensure that the legislature (local or state) is aware of the need for an appropriation to fulfill the terms of the contract. In some states,¹⁹⁵ the public employer has a duty to submit a request for an appropriation within a certain time period after an agreement is reached. In Connecticut, failure to submit such a request is a “prohibited practice.”¹⁹⁶ Whether the employer has any duty beyond bare submission in these states has not yet been determined. But the employer may have a responsibility for shepherding the request for appropriations through the legislature, at least at the local level. In the Rhode Island case of *Town of Scituate v. Scituate Teachers' Association*,¹⁹⁷ the Providence County superior court, reprimanding a school committee for not making its financial problems clear to the town meeting and for failing to call a special meeting to present the problem to the voters, said, in effect, that the public employer must “try harder” to acquire the means to fulfill its obligations.¹⁹⁸

193. 81 L.R.R.M. 2836 (Del. Ch. 1972).

194. 81 L.R.R.M. at 2840. The court conceded that the state could not be bound to spend funds not appropriated, but went on to observe:

On the other hand, the legislature certainly could not have intended that agencies of the State should enter into these agreements and not be bound thereby. . . . [S]uch an interpretation would make a mockery and a meaningless exercise of the statute. . . . It follows that although their agreement could not bind the department to the expenditure of funds for health insurance until those funds had been properly appropriated, it could and did bind the department to do all of those things contemplated which were within the department's legitimate powers. . . . [T]he department may not hide behind a veil of administrative inaction drawn across the terms of an otherwise properly negotiated instrument.

81 L.R.R.M. at 2839.

195. *E.g.*, CONN. STAT. ANN. § 7-474(b) (1972); MASS. ANN. LAWS ch. 149, § 178I (Supp. 1972).

196. CONN. STAT. ANN. § 7-474(b) (1972). A prohibited practice is virtually synonymous with “unfair labor practice” as used in the NLRA. *See* CONN. STAT. ANN. § 7-470 (1972).

197. 82 L.R.R.M. 2005, *affd.*, — R.I. —, 296 A.2d 466 (1972).

198. This dispute arose when the town meeting rejected the school committee's request for a budget increase to pay higher teachers' salaries which the committee had negotiated. As a result, the committee was confronted with the choice of fulfilling the

"Adoption" may also be accomplished through a third method—by having the public employer use its emergency powers to fulfill its contractual obligations. In *Union Free School District No. 5*,¹⁹⁹ the New York PERB held that the employer had failed to bargain in good faith over pay increases and fringe benefits, despite the fact that the voters had rejected two proposed budgets, leaving the school district without adequate funding. PERB noted that the New York Education Law permits a school board to levy, on its own initiative, taxes necessary to pay for "teachers salaries" and "ordinary contingent expenses" when the voters reject proposed budgets,²⁰⁰ and since salary matters were specifically covered by the law, and fringe benefits were covered by the phrase "ordinary contingent expenses," the employer was not precluded either in fact or by law from paying the agreed-upon increases.

Regardless of whether the administrative arm of government fulfills its duty to adopt the contract, additional complications may arise if the local legislature remains obdurate and refuses to make appropriations to finance the contract. In affirming the superior court's dismissal of *Town of Scituate*,²⁰¹ where the trial court noted the possible problems which such a refusal would create, the Rhode Island supreme court said that it was not clear "whether and to what extent a school committee may bind a municipality to financial commitments for school purposes which cannot be satisfied from funds appropriated or otherwise available for those purposes."²⁰² In another context, however, the Rhode Island supreme court has, in effect, required an appropriation to be made by holding that an arbitration award granting disputed benefits had the effect of a judgment and that the lack of an appropriation was no excuse for failure to pay a contractual debt.²⁰³ A common pleas court in Pennsylvania has taken this reasoning one step farther. Even though no *judgment* was involved, the court held that the contract itself provided sufficient authority for the court to order the City of Philadelphia to appropriate funds to continue disability payments to policemen and firemen.²⁰⁴ The contractual obligation constituted a

contract or making educationally detrimental cuts in the school program. The court did not indicate what action it would take if the town again rejected a request for the money needed to fund the contract. 82 L.R.R.M. at 2007.

199. 5 N.Y. PERB 3101 (1972).

200. N.Y. EDUC. LAW § 2023 (McKinney Supp. 1971).

201. *Town of Scituate v. Scituate Teachers' Assn.*, — R.I. —, 296 A.2d 466 (1972).

202. — R.I. at —, 296 A.2d at 469.

203. *Teachers Local 958 v. School Comm.*, 108 R.I. 444, 276 A.2d 762 (1971).

204. *Council 33, AFSCME v. Philadelphia*, 81 L.R.R.M. 2539 (1971).

debt of the city, the payment of which was enforceable to the same extent as obligations incurred under any other contract.

It should be evident from the above discussion that states are increasingly opting for vigorous enforcement of the duty to bargain, even where it has ramifications for that most "public" of public sector areas, the appropriations process. There seems to be a growing realization that past fears concerning the effects of a relatively broad duty to bargain have been largely unwarranted. Public employers generally have not bargained away their "public trust" at the negotiations table, and the control of public fiscal matters has not been taken from the hands of the legislature. The enforcement process has made employers aware that there is a difference between hard bargaining and no bargaining, and has instilled in the minds of government administrators and appropriating bodies the concept that a collective bargaining agreement is a solemn obligation requiring the use of best efforts to ensure its implementation.

IX. CONCLUSION

In states such as Michigan, New York, Pennsylvania, Connecticut, and Wisconsin, the trend toward the use of private sector principles to guide the development of labor relations in the public sector is accelerating. In most of the remainder of the country, however, this trend is not so well developed; indeed, it is nonexistent in many states. The "leading" states may now be establishing precedents which the others will eventually follow, though this is by no means certain. The recent establishment of public employment relations boards in such states as Kansas and Hawaii²⁰⁵ should add to the number of "leading" states and further accelerate the development of public employee bargaining law.

The trend toward finding private sector analogues to public sector problems has important implications for the bargaining rights of public employees. First, it means that judiciary and administrative tribunals are placing more stress on the word "bargaining" and less on the word "public." There is a dawning realization that public employees are primarily *employees* and only secondarily *government* employees. Therefore, they should be denied bargaining rights available to other employees only when there are compelling governmental or public policy reasons for such restrictions. Increasingly, the discovery is being made that requiring a public employer to bargain collectively over a relatively wide range of subjects does not in

205. HAWAII REV. STAT. § 89-5 (Supp. 1971); KAN. STAT. ANN. § 75-4323 (Supp. 1972).

itself prejudice the interests of the government. To compel bargaining is not to compel agreement.

Second, a number of outmoded concepts, of both ancient and more recent vintage, are being discarded. Fears that public employee bargaining would impinge on the sovereign authority of the state or lead to illegal delegations of power by public employers have by and large proved not to be justified. The meet-and-confer approach, once believed to be a workable compromise between the right of the public to control the political process and the right of employees to bargain collectively, now appears to be obsolete and may eventually disappear altogether. Where doubts concerning the efficacy of full collective bargaining in the public sector remain, they are manifested in the enactment of statutory management-rights clauses designed, apparently, to retain a good measure of the public employer's discretion with respect to subjects which would otherwise be bargainable. Such clauses do little to promote good faith bargaining on the part of public employers, and they add to the burdens of courts and public employment relations boards to the extent that they require clarification in particular fact situations. However, management-rights clauses may not be insurmountable obstacles to the development of a broad scope of bargaining; as one case, *IBEW Local 2219*,²⁰⁶ has suggested, the burden may eventually devolve upon the employer to show that a management-rights clause has been properly invoked in a given case.

Third, the trend in public sector labor relations toward the private sector model suggests that criteria must be developed to identify situations in which private sector principles must legitimately be modified before they are applied to the public sector. There are two primary distinctions between the two sectors: the strike proscription and the nature of the political process, including budgetary considerations. The strike proscription arguably (although not necessarily in fact) denies to government employees a powerful economic weapon available to other employees. To compensate for the loss of this weapon, some tribunals have made adjustments in duty to bargain requirements. One such adjustment is the extension of the duration of the duty to include the impasse procedures which function in part as strike substitutes. Additionally, the absence of the strike weapon may entitle employees to the maintenance of the status quo while a new contract is being negotiated. Another adjustment may come about if the *Westwood Community Schools* tests,²⁰⁷

206. See text accompanying notes 138-41 *supra*.

207. See text accompanying notes 159-61 *supra*.

or at least the rationale for these tests, are adopted generally in place of the mandatory-permissive distinction operative in the private sector. So long as state legislatures believe that strikes in the public sector ought to be proscribed, there may in fact be no reason to adhere strictly to the mandatory-permissive distinction. In that case the real question relates to the *appropriateness* of the subject for bargaining and not to the *consequences* of a refusal to bargain in terms of disruption of industrial peace, a key rationale for the strict lines between mandatory and permissive subjects in the private sector. If strikes are legalized, however, the mandatory-permissive distinction would appear to be applicable to the public sector without qualification.

The relation of collective bargaining to the political process raises thorny questions of the rights of public employees versus the prerogatives of government. To what extent, for example, is a city council free to pass ordinances of obvious community interest, even though these may remove arguably mandatory subjects of bargaining from the table? The problems become particularly difficult with respect to the budgetary process. To what extent must an employer bargain on economic matters when its budget has not yet been drawn up, much less approved by the legislature? What are the consequences if an agreement is reached but the legislature cuts the budget? How much should an employer cut back other operations to pay employees according to the terms of the contract? The experience of the past few years suggests that these questions can be answered in such a way as to guarantee bargaining rights without jeopardizing government control of the public fisc. Clearly, there are limitations on the extent to which the government may be required to appropriate and allocate money, just as there are limitations on the extent to which public employees may determine, through the bargaining process, policies which are matters in the domain of the community as a whole or its elected representatives. But the legitimate expectations of public employees should not be thwarted by mere platitudes. The determination that bargaining is not appropriate should be made only after a searching examination of the competing policies involved. And where an agreement has been reached, it should be denied enforcement only if the party seeking denial has carried the burden of showing that all alternatives to nonenforcement have been exhausted.